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No._____

In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court constitutionally award massive punitive damages based on a jury finding of "fraud," where no fraud cause of action has been pleaded or proved and where no fraudulent conduct, as defined in the state's punitive damages statute, has even been alleged?

LIST OF PARTIES TO THIS PROCEEDING

The only parties to this proceeding are petitioner Standard Fire Insurance Company, the defendant in the state courts, and respondent Frank Burnaby, the plaintiff below.

The Standard Fire Insurance Company is a wholly owned subsidiary of Aetna Life and Casualty Company of Hartford, Connecticut.

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"The Business of the California Supreme Court: A Comparative Study,"by Karl Manheim, *Loyola of L.A.L.Rev.*, Vol. 26, p. 1085 (1993) 20

"Case Dispositions By the California Supreme Court: Proposed Alternatives,"by Robb A. Scott and Karen J. Wagner, *Cal.L.Rev.*, Vol. 67, p. 788 (1979) 20

"Decertification of Appellate Opinions: The Need for Artculated Judicial Reasoning and Certain Precedent in California Law,"by Julie Hayward Biggs, *So.Cal.L.Rev.*, Vol. 50, p. 1181 (1977) 20

"The Depublication Practice of the Supreme Court," by Joseph R. Grodin, *Cal.L.Rev.*, Vol. 72, p. 514 (1984) 20

"Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court,"by Stephen R. Barnett, *Loyola of L.A.L.Rev.*, Vol. 26, p. 1013 (1993) . . . 20-21

"Punitive Damages: Empirical Findings,"by Mark Peterson, Syam Sarma, and Michael Shanley, published 1987 by the *Institution for Civil Justice of the Rand Corporation* 28

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, the Standard Fire Insurance Company, respectfully prays that a writ of certiorari be issued to review the decision rendered by the Court of Appeal of the State of California, Second Appellate District, Division One. The Supreme Court of California has denied review. The case presents an important issue involving the right to procedural due process of law, in the context of an award of punitive damages based on a finding of "fraud," where

no fraud cause of action was pleaded or proved, and where the defendant had no notice of any charge of fraudulent conduct.

OPINION BELOW

The opinion of the California Court of Appeal, affirming an award of punitive damages against the petitioner, was reported as *Burnaby v. Standard Fire Insurance Company,* 16 Cal.App.4th 135, 20 Cal.Rptr.2d 44 (1993). A copy of this opinion, as published in the official California advance sheets, is Appendix A to this petition.

Following the decision of the Court of Appeal, the defendant Standard Fire Insurance Company filed a petition for review in the California Supreme Court. (Appendix H). The state Supreme Court denied review, but ordered that the opinion of the Court of Appeal not be published, thereby removing it from the body of California law. (Appendix B.)

JURISDICTION

The California Court of Appeal filed its opinion on June 1, 1993. It denied rehearing on June 30, 1993. (Appendix D.) The California Supreme Court filed its order denying review and directing the opinion of the Court of Appeal not to be published on September 2, 1993. (Appendix B.) On that date, the judgment of the trial court (Appendix C), became final as to the State of California.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 *U.S.C.* section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment to the Constitution of the United States. The relevant portion of this amendment is set forth in Appendix J. The case also involves application of California *Civil Code* section 3294, the state's punitive damages statute, the full text of which is set forth in Appendix I.

STATEMENT OF THE CASE

1. The Constitutional Violation.

Plaintiff Frank Burnaby successfully sued his homeowner's insurer, defendant Standard Fire Insurance Company, claiming that the defendant was obligated to pay him, under a homeowner's policy, for landslide damage to his single family residence. The jury decided in his favor on causes of action for breach of contract, breach of the covenant of good faith and fair dealing ("bad faith"), breach of fiduciary duty, and violation of the California *Insurance Code*. He recovered the amount of money he claimed was due under his insurance contract, plus generous extracontractual damages to compensate him for his emotional distress and for his attorney's fees.

After the plaintiff's victory in the first phase of trial, the case proceeded to a second phase of trial devoted solely to the question of punitive damages. Although the jury found that the defendant insurer had not acted with "malice" or "oppression," it found that it was guilty of "fraud." This finding was made even though no fraud cause of action had been pleaded, proved, or submitted to the jury. Moreover, there had not even been any charge of fraudulent conduct, as defined in the California punitive damages statute, in the

pleadings of the plaintiff. Nonetheless, state courts have upheld the jury's award of a half million dollars in punitive damages based on "fraud."

The Standard Fire Insurance Company claims that the award of punitive damages is constitutionally impermissible. Notice of charges is an essential component of due process of law, and there never was any proper notice in this case. The defendant was never apprised of the possibility that the "fraud" portion of the California punitive damages statute could be interpreted so as to allow recovery of punitive damages based on a finding of "fraud" without any fraud cause of action. Moreover, the defendant was never charged with any fraudulent conduct in the plaintiff's operative second amended complaint.

Because of the absence of the constitutional requirement of notice, the award of punitive damages cannot be permitted to stand.

2. The Denial of the Burnaby Claim for Landslide Damage.

Mr. Frank Burnaby is a businessman, who works as a landscape lighting designer. [3 R.T. 2.][1] He is the owner of a single family residence located at 20743 Rock Point Way, Malibu, California, a ranch style house with three bedrooms and two bathrooms. It was built in the early 1960's, and was purchased by Mr. Burnaby in October of 1979. [3 R.T. 3.]

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[1] The abbreviation "R.T." designates the reporter's transcript, while "C.T." refers to the clerk's transcript. Volume numbers precede these abbreviations, and page numbers follow them.

On September 9, 1983, at a time when Mr. Burnaby's house was uninsured, the County of Los Angeles sent notice to certain homeowners in the Big Rock Mesa area of Malibu, California, concerning a public meeting to be held on September 19, 1983. [9 C.T. 3287.] The notice, signed by the County Engineer, indicated that the County had "detected significant evidence that an incipient landslide may be developing in the Big Rock Mesa area." [9 C.T. 3287.] Mr. Burnaby did not receive notice of the public meeting, but learned of it from neighbors who lived to the east of his house, and he attended the meeting. [3 R.T. 10-16.] He saw a map presented at the meeting, and learned that his house was just outside of the tentative boundaries of the landslide. [3 R.T. 16-17.]

In the wake of the public meeting of September 19, 1983, Mr. Burnaby did three things.

First, he filed claims against the County of Los Angeles and various other governmental entities, whose conduct was alleged to have caused the landslide. [8 C.T. 2880-2883; 9 C.T. 3116-3127.] In his claim against the County, which was dated December 16, 1983, and filed on December 19, 1983, Mr. Burnaby alleged that his house had been damaged in the amount of $1.1 million. He stated that the damage "commenced on or about September 19, 1983, is continuing to this date, and appears to be continuing into the foreseeable future." [8 C.T. 2880.] Similar claims were filed against the Flood Control District, the State of California, and the state's Coastal Commission. [9 C.T. 3116-3126.]

The second step taken by Mr. Burnaby after the public meeting of September 19, 1993, was to claim coverage for landslide damage to his house under a long

expired homeowner's policy issued by defendant Standard Fire Insurance Company, which had been in effect from November 28, 1981. to November 28, 1982. [1 C.T. 175-246; 9 C.T. 3264-3283.]

The third and final step taken by Mr. Burnaby after the fateful meeting of September 19, 1983, pursuant to the advice of his attorney, was to try to buy a new policy of insurance. [3 R.T. 24-28.] He was able to secure such a policy from Standard Fire Insurance Company, which issued a policy with a policy period of December 20, 1983, to December 20, 1984. [8 C.T. 2891-2915.]

The key issue in determining coverage for landslide damage is the determination of the date of loss.[2] The Standard Fire Insurance Company determined that the correct date of loss for Mr. Burnaby's claim was during the period of time in which he was uninsured. The claim was therefore denied in a letter dated August 7, 1985, from Mr. Jay Robinson, Standard's coverage attorney, to one of the attorneys representing Mr. Burnaby. [10 C.T. 3751-3753.] In his letter, Mr. Robinson asserted that the appropriate date of loss fell prior to December 20, 1983. As noted above, Mr. Burnaby had asserted in his claims against the County of Los Angeles and other governmental entities, that the date of loss was September 19, 1983. An additional ground for denial of the Burnaby claim, as stated in Mr. Robinson's letter, was that Mr. Burnaby had concealed essential information at the time that he applied for his second

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[2] Under California law, there can be only date of loss in first party claims of the type brought by Mr. Burnaby. *Prudential-LMI Commercial Insurance Company v. Superior Court*, 51 Cal.3d 674, 274 Cal.Rptr. 387 (1990).

Standard homeowner's policy, the one that took effect on December 20, 1983.

3. The Operative Pleadings.

Mr. Burnaby filed his operative second amended complaint [1 C.T. 175-246], on October 22, 1986. A copy of this pleading is Appendix E.

In the second amended complaint, Mr. Burnaby alleged that he was the owner of a house in Malibu, California; that defendant Standard Fire Insurance Company had issued two policies on the house; that the Burnaby residence is located on a hillside which is the site of an ancient landslide which reactivated as early as 1978, destabilizing the land underneath the house; that the landslide is progressive and continuing; that the house can neither be sold nor rented; and that "because the damage has been continuous, progressive and deteriorating [*sic*] during more than one policy period, Standard is liable under both policies." [1 C.T. 177-184.][3]

The second amended complaint contained six separate causes of action, although several of them were no longer in the case at the time of trial. The second cause of action was entitled "fraud." [1 C.T. 187-188.] In this cause of action, it was alleged that the defendant's agent, in a sales presentation, made false representations with respect to the scope of insurance coverage, on which Mr. Burnaby relied in entering into his insurance contracts. There was no

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[3] Since there can be only one date of loss on a claim of the type asserted by Mr. Burnaby, the effort to place the date of loss during two separate time periods represented a legal impossibility. *Prudential-LMI Commercial Insurance Company v. Superior Court,* 51 Cal.3d 674 (1990).

allegation of fraud in the denial of Mr. Burnaby's claim, however. In any event, the second cause of action for "fraud" was abandoned before trial, as was the claim of intentional infliction of emotional distress. [5 C.T. 1803.] As of the end of the first phase of the trial, there were four theories of recovery presented to the jury: breach of contract, "bad faith," breach of fiduciary duty, and violation of the California *Insurance Code*.

In paragraphs 38, 45, and 51 of his second amended complaint, Mr. Burnaby stated the following:

> "Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him. Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages." [1 C.T. 191, 194, 197.]

Although the word "fraudulent" appears in the second amended complaint, attached to the causes of action for "bad faith," breach of fiduciary duty, and violation of the *Insurance Code*, there is no allegation whatsoever in any of these causes of action of any particular fraudulent conduct. No mention is made of any intentional misrepresentation, deceit, or concealment of a material fact that the defendant was bound to disclose. No claim of detrimental reliance is asserted. Rather, the boilerplate language quoted above is not supported by any factual allegations.

Prior to trial, the court granted, in part, Standard's motion for summary adjudication of issues. [4 C.T. 1313-1316.] In a signed order, the court determined that Mr. Burnaby's claim for property damage under the first Standard policy, the one with effective dates of November

28, 1981, to November 28, 1982, was time barred by the applicable one year contractual statute of limitations, thereby precluding coverage under the policy as a matter of law. [4 C.T. 1466-1468.] As a result of this ruling, the issue of determining the correct date of loss was simplified. Either it was in the several months prior to December 20, 1983 (as Mr. Burnaby asserted in his governmental claims), or it was after that date (during the policy period of Standard's second homeowner's insurance policy).

4. The First Phase of the 1989 Jury Trial.

The long and tumultuous trial began on August 14, 1989.[4]

Numerous witnesses testified, including the plaintiff, his insurance agent, the defendant's underwriters, the employees of the defendant who handled the Burnaby claim, insurance experts, legal experts, and geological experts. There was sharp conflict in the evidence, on issues as diverse as the physical condition of the Burnaby residence, the conversations between Mr. Burnaby and his insurance agent, underwriting procedures, and claims handling procedures.

The jury apparently believed Mr. Burnaby's version of events with respect to the purchase of his second Standard policy, rejecting the defendant's claim of conceal-

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[4] The case generated a 20 volume clerk's transcript and a 16 volume reporter's transcript, both of which are on file in the Court of Appeal. However, very little of this substantial record is germane to the remaining issue which the petitioner seeks to present to the Supreme Court of the United States. In fact, virtually all of the relevant portions of the record appear in the appendix to this petition.

ment. Thus, the insurance policy was found to be in effect, and the critical issue was determination of the date of loss.

The jury allowed Mr. Burnaby to change his version of the facts. It overlooked the facts stated in his governmental claims, and also did not hold him to his previous statements under oath. In his opening statement to the jury, Mr. Burnaby's trial attorney revealed that some of his client's answers during the statements under oath were "just plain wrong." [1 R.T. A266.] The jury apparently agreed, and relied on Mr. Burnaby's trial testimony, in which he placed the date of loss in 1984, during the policy period of the second Standard homeowner's policy.

In addition to ruling in favor of the plaintiff on the claim of breach of contract, the jury found "bad faith," breach of fiduciary duty, and violation of the *Insurance Code* on the part of the defendant. These claims hinged on the contention that, in adjusting the Burnaby claim, the defendant should have accepted the evidence placing the date of loss of the Burnaby residence during 1984, disregarding all conflicting evidence, including Mr. Burnaby's own statements in his governmental claims. As noted above, the original cause of action for "fraud" was abandoned before trial, and there was no evidence on the subject and no claim of fraud was submitted to the jury during the first phase of the trial.

The jury returned its initial special verdict on October 27, 1989. [7 C.T. 2647-2651.] It answered sixteen specific questions, all of them in favor of the plaintiff. The jury found that Mr. Burnaby was entitled to contract damages, including prejudgment interest, in the total amount of $235,990.86 [7 C.T. 2649], and extracontractual compensatory damages (for emotional distress and

attorney's fees) in the amount of $600,000.00. [7 C.T. 2651.][5]

5. The Second Phase of the Trial Concerning Punitive Damages.

After the jury's initial verdict was returned, the punitive damages phase of the trial began. Only one witness was called, who testified as to the total net worth of Aetna Life and Casualty Company, the parent company of Standard Fire Insurance Company. [16 R.T. 3437-3461.] He said that the total net worth of the parent company was $6,686,800,000.00. [16 R.T. 3450.]

The issue of punitive damages was submitted to the jury with a standard instruction from California's *Book of Approved Jury Instructions* (BAJI 7th ed.). In particular, the court decided to give BAJI instruction number 14.71, over the objections of the defendant's attorney.

The trial judge and the attorneys for the parties discussed instructions and verdict forms for the second phase of the trial, as follows:

> "*THE COURT*: LET ME JUST FINISH WHAT WE ARE DOING.
>
> "THE SPECIAL VERDICT -- I WOULD USE THE DEFENDANT'S FORM EXCEPT THAT THE DEFENDANT'S FORM APPEARS TO OMIT THE ELEMENT OF FRAUD.

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[5] The special findings of the jury, rendered after each of the two phases of the trial, are recited in the judgment of the trial court. A copy of the judgment is Appendix C.

"*MR. WEATHERUP*: RIGHT. I WANT TO ADDRESS THAT.

"IT SEEMED TO ME THAT THE CAUSE OF ACTION FOR FRAUD WAS ABANDONED AT THE BEGINNING OF THE TRIAL, AND THERE'S NO EVIDENCE OF FRAUD IN THIS CASE. . . . FRAUD AS DEFINED IN THE CIVIL CODE AND IN THE PUNITIVE DAMAGES STATUTE REQUIRES THAT A PERSON BE INDUCED TO ENTER INTO A TRANSACTION BY FRAUD, AND THAT ANY MISREPRESENTATION, ASSUMING THAT THE JURY WERE TO VIEW SOME OF THE EVIDENCE AS SUPPORTING A FINDING OF MISREPRESENTATION, IS NOT ENOUGH TO GET UNDER THE PUNITIVE DAMAGES STATUTE.

"THE B.A.J.I 14.71, DEFINES FRAUD AS AN INTENTIONAL MISREPRESENTATION, DECEIT, OR CONCEALMENT OF A MATERIAL FACT KNOWN TO THE DEFENDANT WITH THE INTENTION ON THE PART OF THE DEFENDANT OF THEREBY DEPRIVING A PERSON OF PROPERTY OR LEGAL RIGHTS OR OTHERWISE CAUSING INJURY.

"AND IT HAS TO BE IN CONNECTION WITH A TRANSACTION.

"I THINK THE GENERAL LAW OF FRAUD IS APPLICABLE. IT JUST CAN'T

BE A MISREPRESENTATION IN THE ABSTRACT, SUCH AS THE PLAINTIFF'S ARGUMENT THAT MR. ROBINSON'S RESCISSION LETTER HAD MISREPRESENTATIONS.

"EVEN IF THAT'S TRUE, WHICH THE DEFENDANT DENIES, THAT'S NOT FRAUD BECAUSE MR. BURNABY DID NOT ENTER INTO ANY TRANSACTION BASED ON THAT." [16 R.T. 3413-3414.]

Apparently, the judge was not persuaded by the argument made by the attorney for the defendant. He decided to give BAJI instruction number 14.71. [16 R.T. 3416-3417.]

The full text of BAJI instruction number 14.71, as given by the court, appears in Appendix F. The instruction authorized an award of punitive damages if the defendant was "guilty" of "fraud." The term "fraud" was defined for the jury as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

6. The Verdict on Punitive Damages.

On October 31, 1989, the jury returned a special verdict on punitive damages. [8 C.T. 2737.] The jury found that the defendant had not acted with "malice" or "oppression," but found it guilty of "fraud." [8 C.T. 2737.] The amount of punitive damages assessed was $500,000.00. [8 C.T. 2737.]

7. The Judgment of the Trial Court.

The defendant filed a timely motion for a new trial. The trial judge determined that the compensatory damages were excessive, and the plaintiff consented to a reduction in the amount of such damages from $600,000.00 to $200,000.00. [8 C.T. 2747-2752.] The judgment was accordingly amended. As amended, the judgment included contract benefits and prejudgment interest in the amount of $235,990.86, extracontractual compensatory damages in the amount of $200,000.00, costs and disbursements in the amount of $79,045.00, and punitive damages in the amount of $500,000.00, for a total judgment of $1,014,990.31. [8 C.T. 2732-2738.] From this judgment, the defendant appealed, on January 12, 1990. [8 C.T. 2753-2755.]

8. The Decision of the California Court of Appeal.

On appeal, the defendant raised numerous issues, mainly issues of state law. It challenged the award of punitive damages on both state and federal grounds, arguing that, if correctly interpreted by the trial court, the punitive damages statute was unconstitutional as applied in the present case.[6]

The Court of Appeal acknowledged the invalidity of the plaintiff's breach of fiduciary duty claim, but found the error harmless. 16 Cal.App.3d at 151-152; 20 Cal.Rptr. 44 at 53-54. All other claims of error were rejected.

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[6] Appendix G is an excerpt from the appellant's opening brief filed in the Court of Appeal on February 19, 1992. The excerpted portion of the brief is devoted to the propriety of the award of punitive damages.

The Court of Appeal disposed of the challenge to the award of punitive damages in section VIII of its opinion. It found that punitive damages for "fraud," under California *Civil Code* section 3294, could be awarded without any fraud cause of action. In fact, according to the Court of Appeal, exemplary damages are "properly awardable in "any 'ex delicto' action," which "arises of fault, misconduct or malfeasance." 16 Cal.App.4th at 154; 20 Cal.Rptr. at 56. The court concluded that "there is ample evidence, which is reviewed hereinafter, to justify the jury award of exemplary damages on the basis of intentional misrepresentation and/or concealment of a material fact with intent to deprive respondent of property, to wit, insurance proceeds, thereby constituting fraud within the meaning of Civil Code section 3294, subdivision a." 16 Cal.App.4th at 155; 20 Cal.Rptr. at 56. However, the Court of Appeal did not, in spite of this statement, proceed to review any such evidence.

9. The Ruling of the California Supreme Court.

After the Court of Appeal denied rehearing (Appendix D), the defendant Standard Fire Insurance Company filed a petition for review in the California Supreme Court. (Appendix H.)

On September 2, 1993, the California Supreme Court denied the defendant's petition for review, thereby making the judgment of the trial court, affirmed by the Court of Appeal, final as to the State of California. (Appendix B.) However, the state Supreme Court ordered the Court of Appeal opinion not to be published, even though the Court of Appeal had certified it for publication. (Appendix B.)

After the denial of its petition for review, defendant Standard Fire Insurance Company satisfied portions of the judgment against it, including the award of contract damages, the award of extracontractual compensatory damages, the trial court costs, and interest on all of these items. The present petition for a writ of certiorari is therefore limited to the constitutional validity of the half million dollar award of punitive damages.

10. The Urgent Need for Review by This Court on a Writ of Certiorari.

The award of punitive damages in this case rests upon violation of the defendant's constitutional right to procedural due process of law. The award was based on a "fraud" finding, even though no fraud cause of action was in the pleadings at the time that trial began, and no claim of fraudulent conduct was alleged.

Punitive damages claims are increasingly common, and are growing like a cancer on the civil justice system. There is no easy solution to the crisis, but minimum standards of due process should be followed, before any award of punitive damages is permitted. At the very least, a defendant should receive notice of the charges on which a claim for punitive damages is based. No such notice was given to the defendant in this case, and the half million dollar award of punitive damages against it should be vacated and set aside.

ARGUMENT

I.

As Interpreted by State Courts in This Case, the California Punitive Damages Statute Allows Severe Punishment Based on a Finding of "Fraud," Without Proof of Any Fraud Cause of Action and Without Even Notice of Any Charge of Fraudulent Conduct.

The Fourteenth Amendment to the Constitution of the United States places procedural and substantive limits on the power of state courts to award punitive damages in litigation among private parties. *TXO Production Corporation v. Alliance Resources Corporation,* __ U.S. __, 113 S.Ct. 2711 (1993). The present case represents a test of the extent of those limits.

One component of procedural due process is notice concerning the danger of a punitive damages award. In *TXO,* this Court rejected the defendant's contention that "the procedure followed in . . . [the] case 'was unconstitutionally vague' because . . . [the defendant] had no notice of the possibility that the award of punitive damages might be divorced from an award of compensatory damages." __ U.S. __, 113 S.Ct. at 2724. It noted that a previous state appellate court opinion made the possibility quite clear. "In any event, the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." 113 S.Ct. at 2724. This Court found that the notice requirement had been satisfied in the *TXO* case.

The *TXO* opinion does not specify in detail the parameters of the constitutional requirement of notice. However, the language of the opinion suggests that there are two components, notice of the law governing punitive damages under particular circumstances, and notice of the factual charges against the defendant that constitute egregiously tortious conduct.

In the present case, the defendant received no notice of the interpretation of the "fraud" portion of the California punitive damages statute, and no notice of any claim that it had engaged in any fraudulent act, as defined in the statute. Thus, the defendant in the present case, unlike the one in *TXO,* had no warning with respect to the punitive damages award visited upon it.

Section 3294(a) of the *Civil Code* of California provides that:

> "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

This provision, with minor amendments, has been part of California law since the enactment of the *Civil Code* in 1872.

"Fraud" is defined in California *Civil Code* section 3294(c)(3) as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise

causing injury." This definition was added to the statute in 1980.

In the long history of California jurisprudence, there is not a single reported decision permitting a defendant to be held liable for punitive damages based on a finding of "fraud," without establishment of a fraud cause of action. In *Orient Handel v. United States Fidelity & Guaranty Company,* 192 Cal.App.3d 684, 237 Cal.Rptr. 667 (1987), a trial court found willful misrepresentation on the part of the plaintiffs, and proceeded to award punitive damages in favor of the defendant, on the defendant's cross complaint. However, the Court of Appeal reversed, holding that the defendant's "award of punitive damages falls with its failure to prove justifiable reliance, an essential element of fraud." 192 Cal.App.3d at 697; 237 Cal.Rptr. at 674. The *Orient Handel* court observed that punitive damages are merely incident to a cause of action, and can never constitute the basis of one. 192 Cal.App.3d at 697; 237 Cal.Rptr. at 674.

In support of its conclusion that punitive damages could be awarded for fraud without any fraud cause of action, the Court of Appeal cited *Arzaga v. Villalba,* 85 Cal. 191, 24 P. 656 (1890) and *Haigler v. Donnelly,* 18 Cal.2d 674, 117 P.2d 331 (1941). Neither of these cases remotely supports the holding of the Court of Appeal. In *Arzaga,* the defendant accomplished conversion of property by means of fraud, and thus the cause of action against the defendant was a fraud cause of action as well as a conversion cause of action, and punitive damages were justified. The *Haigler* case is simply irrelevant, because the award of punitive damages was based on malice, not fraud.

The Supreme Court of California was undoubtedly disturbed by the unprecedented, unfair, and unconstitutional

interpretation of the punitive damages statute adopted by the trial court in this case and upheld by the Court of Appeal. In response, it "depublished" the Court of Appeal opinion.[7]

The effect of the Supreme Court's depublication order is to consign the Court of Appeal opinion to oblivion. Except in rare cases involving the same parties, an unpublished opinion "shall not be cited or relied upon by a court or a party in any other action or proceeding." Rule 977(a) of the California *Rules of Court.*

The practice of depublication appears to be unique to California, and has become very controversial in the state's legal circles. The practice has been vigorously defended in an article written by a sitting justice of the state Supreme Court, "The Depublication Practice of the Supreme Court," *Cal.L.Rev.*, Vol. 72, p. 514 (1984), by Joseph R. Grodin. Other authors, however, have been sharply critical. "Case Dispositions By the California Supreme Court: Proposed Alternatives," by Robb A. Scott and Karen J. Wagner, *Cal.L.Rev.*, Vol. 67, p. 788 (1979); "Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law," by Julie Hayward Biggs, *So.Cal.L.Rev.*, Vol. 50, p. 1181 (1977); "The Business of the California Supreme Court: A Comparative Study," by Karl Manheim, *Loyola of L. A. L. Rev.*, Vol. 26, p. 1085 (1993); "Making Decisions Disap-

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[7] Although the word "depublish" does not frequently appear in dictionaries, it has come into common usage in California. It refers to the practice of the state Supreme Court of directing opinions of the intermediate Courts of Appeal not to be published in the permanent bound *California Reports* after the Courts of Appeal have already certified them for publication.

pear: Depublication and Stipulated Reversal in the California Supreme Court," by Stephen R. Barnett, *Loyola of L. A. L. Rev.*, Vol. 26, p. 1013 (1993).

The principal defense of the practice of depublication is that the workload of the California Supreme Court is so heavy that the court is not able to accept all cases in which plain error appears in reported decisions of the intermediate Courts of Appeal. By depublication, erroneous holdings, such as that found in the interpretation of the state punitive damages statute by the Court of Appeal in this case, are rendered null and void for future cases. However, the decision of the Court of Appeal remains intact, and the party aggrieved by the erroneous holding of the Court of Appeal is left without a remedy in the state legal system.

Although the erroneous opinion of the Court of Appeal may no longer be cited in other cases, it remains binding on Standard Fire Insurance Company in this case. It has been held that a half million dollar award of punitive damages is permissible on the basis of a finding of "fraud," without any assertion of a fraud cause of action and without any notice of any charge of fraud on the part of the defendant. The defendant's constitutional right to notice of the applicable law and notice of the factual nature of the conduct charged has been violated. This clear violation by state courts is constitutionally unconscionable. Even if the California Supreme Court is too busy to protect the constitutional rights of the defendant, the Supreme Court of the United States should do so.

II.

Because the Constitutional Guarantee of Due Process of Law Requires Proper Notice of the Misconduct Charged, and of the Law that Has Been Violated, Before Penalties Are Assessed or Property Is Seized, the Award of Punitive Damages in the Present Case, Made Without Any Notice at All, Must Be Set Aside.

A classic statement of the constitutional right to notice can be found in *Lambert v. People of the State of California,* 355 U.S. 225 (1957). In *Lambert,* this Court declared that:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." 355 U.S. at 228.

For this statement, the Court relied on cases which "involved only property interests in civil litigation." 355 U.S. at 228. However, the right to notice is "equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." 355 U.S. at 228.

To be constitutionally sufficient, adequate notice must be given of legal proceedings, which must be reasonably calculated to inform parties of those proceedings which may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson,* 352 U.S. 112, 115-

116 (1956). See also, *Covey v. Town of Somers,* 351 U.S. 141 (1956).

In *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950), this Court overturned a state court decree settling accounts by the trustee of a common trust fund, on the ground that the notice given under state law was insufficient to satisfy the requirements of the Fourteenth Amendment. The Court observed that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313. The notice in the *Mullane* case was insufficiently specific, because the beneficiaries of the trust in question were not notified of the right to have the trustee answer for negligent or illegal impairment of their interests. Furthermore, the beneficiaries were not notified about the fact that fees might be allowed that would diminish payments to them. 339 U.S. at 313.

The requirement of notice includes fair warning of what the law prohibits. *Bouie v. City of Columbia,* 378 U.S. 347 (1964). In addition, the particular conduct said to violate the law must be specified. *Stirone v. United States,* 361 U.S. 212 (1960); *Russell v. United States,* 369 U.S. 749 (1962). As noted above, the requirement of notice applies equally in civil and criminal cases.

Punitive damages are in the nature of "private fines levied by civil juries." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 49 (1979). Moreover, punitive damages are quasi-criminal in character, but their

imposition is sometimes unaccompanied by the types of safeguards present in criminal proceedings. *Smith v. Wade,* 461 U.S. 30, 59 (1983) (dissenting opinion of Justice William H. Rehnquist, with Chief Justice Warren Burger and Associate Justice Louis Powell concurring). The purpose of punitive damages is to punish the defendant whose wrongful conduct was intentional or malicious, and to deter him and others from similar conduct in the future. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 266-267 (1981).

In *Gray v. Raines,* 662 F.2d 569 (9th Cir. 1981), the United States Court of Appeals for the Ninth Circuit reversed a criminal conviction. The defendant had been charged with forcible rape. However, at the conclusion of the trial, the prosecution successfully sought a jury instruction on statutory rape. The defendant was acquitted of forcible rape, but convicted on the lesser offense, with which he had not been charged. The court held that the constitutional requirement of notice had been violated. Similarly, in this case, the issue of "fraud" was submitted to the jury after the close of evidence, without notice.

The civil equivalent of a criminal indictment is a complaint. Although this Court "has endorsed the modern relaxation of pleading rules, it has never receded from the requirement that civil complaints provide party's defendant with 'fair notice' of the claims against them." *New Motor Vehicle Board of the State of California v. Orrin W. Fox Company,* 439 U.S. 96, 125 (1978) (dissenting opinion of Justice John Paul Stevens, citing the unanimous opinion of the Court in *Conley v. Gibson* 355 U.S. 41 (1957)).

As noted above, the defendant never received any notice of the trial court's bizarre interpretation of the state's

punitive damages law, whereby such damages could be recovered, in this case only, on the basis of a finding of "fraud" without any fraud cause of action. Even worse, the pleadings of the plaintiff contained no allegation with respect to any intentional misrepresentation, deceit, or concealment of a material fact. There was nothing at all in the second amended complaint about detrimental reliance, whereby the plaintiff supposedly had been deprived of his property.

It is difficult to discern what evidence was relied upon by the jury, the trial judge, and the Court of Appeal in justifying the half million raid on the treasury of the defendant insurance company. It could not be evidence of the statements allegedly made by the plaintiff's insurance agent, since the plaintiff, at the time, had no property interest of which he could have been deprived, since the insurance contract in question had not yet been issued. Similarly, statements made to the plaintiff or his lawyers with respect to the claimed lack of coverage did not deprive the plaintiff of any property or legal rights. In virtually every civil case, the defendant makes statements denying liability. The defendant's statements do not deprive the plaintiff of anything; it is the defendant's refusal to pay that does so.

Even if there were evidence of "fraud" in the voluminous record, there was still a violation of the constitutional right to notice. There never was any notice of the interpretation of the law that would be applied, and there was no notice in the pleadings of any claim of fraudulent conduct.

The facts of the present case are easily distinguished from those in *TXO Production Corporation v. Alliance*

Resources Corporation, __ U.S. __, 113 S.Ct. 2711 (1993). In *TXO,* unlike the present case, there was ample notice of the relevant law, in the statutory and decisional law of West Virginia. Moreover, it appears that the defendant held liable for punitive damages had sufficient notice in the pleadings of the adverse party of the egregious conduct charged, since there was not even a claim that the adverse party's pleadings were defective.

The law of punitive damages does not represent an exception to the constitutional right of notice. Like every other defendant, an insurance company is entitled to appropriate warning before its property can be looted. Claims for punitive damages are now rampant, but they must be subject to procedural due process.

III.

In Light of the Continuing Punitive Damages Crisis in the Nation's Courts, and in View of the Magnitude of the Constitutional Violation in This Case, Certiorari Should Be Granted in Order to Ensure Justice for All Defendants Threatened with Confiscation of Their Property Without Notice of Any Claim of Wrongdoing.

For a variety of reasons, there has been an enormous increase in punitive damages litigation. The number of cases in which such damages are sought has skyrocketed, along with the amounts of money awarded. However, neither state nor federal law has adequately protected defendants from arbitrary punishment at the hands of hostile juries.

Many defendants whose property has been pilfered by aggressive plaintiffs and their lawyers have sought refuge in the federal Constitution. Recent decisions of this Court attest to the magnitude of the punitive damages crisis, including *Aetna Life Insurance Company v. Lavoie,* 475 U.S. 813 (1986); *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989); *Pacific Mutual Life Insurance Company v. Haslip,* 499 U.S. 1 (1991); and *TXO Production Corporation v. Alliance Resources Corporation,* __ U.S. __, 113 S.Ct. 2711 (1993). The facts of these cases vary considerably, but each of them involved a substantial award of punitive damages at the whim of a jury. Arbitrary awards may or may not, however, violate the Constitution.

The extent of the punitive damages crisis is difficult to measure nationally. In California, there is at least some information available. Prior to 1960, the largest award of punitive damages upheld on appeal was $10,000.00. *Larrick v. Gilloon,* 176 Cal.App.2d 408, 1 Cal.Rptr. 360 (1959), overruled on other grounds by *Field Research Corporation v. Superior Court of San Francisco,* 71 Cal.2d 110, 77 Cal.Rptr. 243 (1969). In the 1960's, the highest award affirmed was 25 times greater, an award of $250,000.00, in *Toole v. Richardson-Merrell, Inc.,* 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967). For the 1970's, the highest reported award that was upheld was $740,000.00, in *Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 148 Cal.Rptr. 389 (1979). In the 1980's and 1990's, there has been a literal explosion in the frequency and size of punitive damages awards in California. An award of $5,000,000.00 in punitive damages was upheld in an insurance "bad faith" case, *Downey Savings and Los Association v. The Ohio Casualty*

Insurance Company, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987), *cert. denied*, 486 U.S. 1036 (1988).

Perhaps the most comprehensive study of punitive damages awards in California is that entitled "Punitive Damages: Empirical Findings," by Mark Peterson, Syam Sarma, and Michael Shanley, which was published in 1987 by the *Institution for Civil Justice of the Rand Corporation.* According to the *Rand* study, "[i]n one out of every ten trials in major urban California jurisdictions where defendants were found liable for compensatory damages, juries also assessed punitive damages." (Page 33.) Awards of punitive damages were largest in Los Angeles County, where the average such award was $1.3 million. (Page 36.) In California as a whole between 1980 and 1984, jurors awarded $311,000,000.00 in punitive damages. (Page 42.)

There is no easy solution to the punitive damages crisis, which is plaguing the entire court system. The Constitution does not prohibit loose legal standards in state courts. It does not always forbid appeals to prejudice against insurance companies, manufacturers, banks, or other unpopular institutions. Nonetheless, this Court should ensure minimum standards of procedural due process of law. Even unpopular defendants should be given notice of the charges against them, before their property is appropriated.

The plaintiff and the courts of California ran roughshod over the rights of the Standard Fire Insurance Company in this case. This Court should intervene to rectify the violation of the defendant's right to notice. It would therefore afford procedural due process to other defendants threatened with punitive damage claims, without any specification of a claim of wrongdoing.

IV.

Conclusion.

If there is any substance to the constitutional right to notice before forfeiture of a defendant's property, then relief should be granted to the petitioner in this case. There has been a substantial award of punitive damages against the petitioner without warning as to the legal standard for awarding such damages, and without notice of any charges of wrongdoing.

It is respectfully submitted that the Supreme Court of the United States should grant this petition for a writ of certiorari, in order consider the issue presented. Thereafter, this Court should reverse the decision of the California Court of Appeal, and nullify the unconstitutional award of punitive damages.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL, and
Roy G. Weatherup

Attorneys for Petitioner
STANDARD FIRE INSURANCE COMPANY

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on November 24, 1993, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

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Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 1993, at Los Angeles, California.

Betty J. Malloy
(Original Signed)

93-848

Supreme Court, U.S.
FILED
NOV 29 1993
OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I OF II (Appendix A To G)

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75 pp

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BURNABY V. STANDARD FIRE INS. CO.
16 Cal.App.4th 135; -- Cal.Rptr.2d -- (June 1993)

[No. B047665. Second Dist., Div. One. [June 1, 1993.]

FRANK BURNABY, Plaintiff and Respondent, v. STANDARD FIRE INSURANCE COMPANY, Defendant and Appellant.

SUMMARY

A jury rendered a special verdict finding that defendant insurer had breached the terms of an insurance contract and had acted in bad faith in doing so. The jury awarded plaintiff insured damages including noncontractual damages, prejudgment interest, and punitive damages. Plaintiff brought the action after defendant denied his claim for property damage that had resulted from destabilization of land. Plaintiff had previously made claims against several governmental agencies upon being informed of land movement in the geographic area near his home. In plaintiff's application for the property insurance, it was reported that there were "no losses prior to the application." (Superior Court of Los Angeles County, No. WEC089584, Richard G. Harris, Judge.)

The Court of Appeal affirmed. It held that sufficient evidence supported the jury's findings that plaintiff had not concealed material facts, that there was no damage prior to the issuance of the policy, and that damage occurred while the policy was in effect. It held that plaintiff's expert

witnesses possessed sufficient skill or expertise such that their testimony on insurance matters would be likely to assist the jury. It also held that sufficient evidence supported the jury's award of damages, and that the award of punitive damages was not improper. It finally held that the insurer was not entitled to assert subrogation rights, notwithstanding that plaintiff had recovered from a third party tortfeasor, since the insurer had not paid on the insured's claim. (Opinion by Dunn, J.,* with Ortega, Acting P.J., and Masterson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1d) Insurance Contracts and Coverage § 129—Actions—Evidence—To Support Findings—Jury Determination That Insured Did Not Conceal Material Fact on Application.—In an insured's action against a property insurer arising from defendant's denial of a claim, sufficient evidence supported the jury's findings that plaintiff had not concealed material facts in his insurance application, that there was no damage prior to the issuance of the policy, and that damage occurred while the policy was in effect. Before applying for the policy, plaintiff had been apprised of ground destabilization and had made claims against several governmental agencies. In plaintiff's application for the property insurance, it was reported that there

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*Judge of the Municipal Court for the Long Beach Judicial District sitting under assignment by the Chairperson of the Judicial Council.

were "no losses prior to the application." Although defendant asserted that it would not have insured plaintiff had it known of cracks in his pavement, a jury is not required to believe the post mortem testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed. Moreover, there was evidence that plaintiff had advised defendant's agent of the cracks and that the agent was not concerned. Also, there was evidence that the agent, not plaintiff, had completed the application form, and there were reports that the damage occurred while the policy was in effect.

[See **Cal.Jur.3d,** Insurance Contracts and Coverage, § 193.]

(2) **Insurance Contracts and Coverage § 36—Avoidance of Policy—Misrepresentation and Nondisclosure by Insured.**—A material misrepresentation or concealment of material facts is a proper basis for the rescission of a policy of insurance.

(3) **Appellate Review § 149—Scope of Review—Sufficiency of Evidence—Power of Court.**— When the sufficiency of evidence is challenged on appeal, the scope of the appellate court's power of review is to ascertain whether there is substantial evidence to support the finding below. When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact.

(4) **Appellate Review § 129—Scope of Review—Findings of Jury.**—The findings of a jury

must be given a liberal construction to the end of supporting a judgment.

(5) **Insurance Contracts and Coverage § 132—Actions—Questions of Law and Fact—Occurrence of Appreciable Damage.**—In actions concerning insurance coverage, the question of when appreciable damage occurs to place one on notice of a potentially insured loss is a factual matter for the trier of fact.

(6a, 6b) **Evidence § 82—Opinion Evidence—Expert Witnesses—Qualifications—Witnesses Testifying in Insurance Coverage Action.**—In an insured's action against a property insurer arising from defendant's denial of a claim, the record established that two expert witnesses possessed sufficient skill or expertise such that their testimony on insurance matters would be likely to assist the jury. Thus, the trial court did not abuse its discretion in permitting them to testify. The first expert attended two well-known universities and earned both B.A. and M.B.A. degrees with concentration in finance and insurance, graduated first in his class, and was the recipient of several honors while in college. He spent his life's work in the insurance field in many capacities, from chartered property and casualty underwriter to lecturer in insurance, business, law, and economics at the university level. The second expert was an attorney who had spent 23 years specializing in insurance and numerous years advising insurance companies regarding legal claims.

[See 1 **Witkin,** Cal. Evidence (3d ed. 1986) § 475.]

(7) **Evidence § 85—Opinion Evidence—Expert Witnesses—Hypothetical Questions.**—An expert witness may give his or her opinion based upon facts the witness has not personally observed but which are put to him or her in the form of hypothetical questions. The value of any opinion of an expert depends upon the reliability of the source of the facts assumed.

(8) **Evidence § 82—Opinion Evidence—Expert Witnesses—Qualifications—Discretion of Court.**— The qualification of an expert witness is within the sound discretion of the court and its ruling will not be disturbed in the absence of clear abuse. Indeed, the exclusion of admissible expert testimony may constitute reversible error.

(9) **Witnesses § 10—Expert Witnesses—Impeachment of Expert's Assumptions by Rebuttal Lay Witness.**—In an insured's action against a property insurer arising from defendant's denial of a claim of damage caused by ground movement, the trial court did not err in permitting a geologist to testify on plaintiff's behalf. The geologist was called as a lay witness for the purpose of impeaching certain assumptions held by defendant's expert witness regarding the geologist's conclusions. The court specifically directed that the geologist was not going to express an opinion, but to answer whether he had reached a certain conclusion. The record reflected that the questions were put to the witness as directed by the court and his answers were all either "yes" or "no."

(10) **Appellate Review § 39—Presenting and Preserving Questions in Trial Court—Evidence—Waiver of Appeal by Failure to Object.**—A party who wishes to raise the admission of inadmissible evidence as a point of error on appeal must object at the trial, stating specifically the grounds of the objection and directing the objection to the particular evidence the party seeks to exclude. A failure to object waives the defect. Thus, in an insured's action against a property insurer arising from the insurer's denial of a claim, even if there were valid grounds at trial for objecting to the testimony of a certain witness, the insurer failed to preserve it for appeal by making a timely and specific objection.

(11) **Appellate Review § 47—Presenting and Preserving Questions in Trial Court—Conduct of Counsel.**—On appeal of an adverse judgment in an insurance coverage action, defendant insurer was precluded from raising the issue of alleged misconduct on the part of plaintiff's counsel. A claim of attorney misconduct will not be considered on appeal unless there is demonstrated in the record a timely and proper objection coupled with a request that the jury be admonished. Since the adverse effect of misconduct can generally be cured by an admonition or instruction to the jury to disregard it, it is essential that the trial court be given, by proper objection, an opportunity to act. Defendant failed adequately to object at trial and therefore waived review of the alleged misconduct on appeal. Moreover, a judgment will not be disturbed on appeal on the basis of attorney misconduct unless, from the entire record, it appears that the misconduct resulted

in a miscarriage of justice. Although the case was aggressively litigated, defendant failed to demonstrate instances in the record in which the nature and seriousness of any remarks or misconduct by plaintiff's counsel established the requisite prejudice.

(12) **Mandamus and Prohibition §27—To Courts—Binding Effect of Issuance of Writ.**—In an action arising from an insurer's denial of an insured's claim, the trial court did not err in reinstating a cause of action for statutory violations (Ins. Code. § 790.03) that the law and motion judge had earlier dismissed. After the cause of action was dismissed, plaintiff sought a writ of mandate from the Court of Appeal. That court ordered issuance of a writ of mandate directing the trial court to reinstate the cause of action. Thus, the trial court was duty bound to reinstate the statutory cause of action.

(13) **Insurance Contracts and Coverage § 133—Actions—Instructions—Insurer's Fiduciary Duty.**—In an action arising from an insurer's denial of an insured's claim, the trial court's error in instructing the jury on an insurer's fiduciary duty was harmless. It was true that several appellate courts, subsequent to trial of the present matter, had held that an insurer is not a fiduciary of its insured. Assuming those cases required a finding that the instruction was erroneous, defendant insurer suffered no prejudice. The only description of a fiduciary set forth in the instructions was a statement that an insurer may not put its own interest above that of the insured. That instruction was a correct statement and did not impose a higher standard on defendant

than that actually imposed by law. Also, although the instructions placed the burden on defendant to show that it had not breached any fiduciary duty, the special verdict form established that the jury found defendant liable and awarded extracontractual damages on theories of breach of the duty to deal in good faith, commission of unfair and deceptive acts, and breach of fiduciary duty. Since the insurer's obligation was properly defined, little harm could have been done by shifting the burden of proof on that one cause of action.

(14) **Insurance Contracts and Coverage § 129—Actions—Evidence—To Support Findings—Insurer's Bad Faith.**—In an action arising from an insurer's denial of a claim for injury to property caused by destabilization of land, substantial evidence supported the jury's award of compensatory and exemplary damages arising from defendant's breach of the duty to deal reasonably and in good faith with plaintiff. Although defendant had denied the claim on the ground that plaintiff had concealed previous losses, the evidence established that the injury to plaintiff's property occurred during the period the insurance policy was in effect. When applying for the insurance, plaintiff had advised defendant's agent of cracks on the property, and the agent told plaintiff that the proximity of the property to a nearby landslide was not a problem. Also, the internal records of defendant showed that it was aware of the slide area, that defendant's parent company insured other property in the same locality, and that underwriters had the opportunity to inspect plaintiff's property. The evidence also indicated that

someone other than plaintiff had indicated that there had been "no previous losses" on the policy application. Further, there was expert testimony as to the time period during which the ground movement reached the area where plaintiff's home was located. Finally, evidence that defendant did not consult a known expert indicated bad faith.

(15a, 15b) **Insurance Contracts and Coverage § 138—Actions—Punitive Damages—Wrongful Denial of Claim.**—In an action arising from an insurer's denial of a claim for injury to property caused by destabilization of land, the trial court did not err in submitting the issue of punitive damages to the jury, even though plaintiff did not plead and prove a cause of action for fraud. Civ. Code, § 3294, subd. (a), permits an award of punitive damages where there has been malice, fraud, or oppression. The term "fraud," as defined in Civ. Code, § 3294, subd. (c)(3), is not a codification of the tort of fraud. The jury considered the cause of action pleaded for violation of Ins. Code, § 790.03 (unfair or deceptive acts or practices), and concluded that there was no "malice" or "oppression" but that defendant was "guilty" of fraud. Thus, it was not necessary for plaintiff to plead and prove a fraud cause of action.

(16) **Damages § 22—Exemplary or Punitive Damages—Ex Delicto Action: Words, Phrases, and Maxims—Ex Delicto Action.**—Where an action is ex delicto in nature, exemplary damages are properly awardable. An action is ex delicto if it arises out of fault, misconduct, or malfeasance and includes

the wrongful taking of a person's property or injury to it.

(17a-17d) **Insurance Contracts and Coverage § 121—Subrogation—Insurer That Improperly Denied Insured's Claim.**—An insurer that unreasonably and in bad faith denied an insured's claim for injury to property was not entitled to assert subrogation rights after the insured successfully sued and recovered from a third party tortfeasor. The general rule is that an insurer is subrogated in an amount equivalent to that which it has paid. Until the insurer has paid the claim under the policy, no rights accrue to it. Since the insurer made no payment on the claim, no subrogation rights arose. Moreover, the language of the insurance contract's assignment clause could be reasonably interpreted to provide that payment of benefits for a loss covered under the policy was a condition precedent to the insurer's right to require the insured to execute documents of assignment of rights against the tortfeasor. The insurer failed to properly assert its contractual subrogation rights by unreasonably denying the claim, failing to offer assistance in the insured's claim against the third party, and failing to take affirmative steps to protect its interests in the third party action. Further, in light of the insurer's nonpayment of the claim and the jury's determination of the insurer's bad faith dealing, no subrogation rights arose under equitable principles.

(18) **Insurance Contracts and Coverage § 121—Subrogation—Definition: Words, Phrases, and Maxims—Subrogation.**—Subrogation is the

right of an insurer to substitute itself in place of its insured to seek recovery from the legally responsible third party tortfeasor for loss paid by the insurer to the insured. That is to say, an insurer, upon paying a loss, is subrogated in a corresponding amount to the insured's right of legal action against any other person whose tortious action has caused the loss.

(19) **Subrogation § 1—Source of Right.**—The right to subrogation arises by contract and upon equitable principles.

(20) **Insurance Contracts and Coverage § 34—Avoidance of Policy—Failure to Comply With Terms.**—It is basic that when the insurer and insured accept the policy, each accepts the conditions imposed by the terms of the policy. If one party fails in some substantial respect to comply with the terms, that party cannot, in the absence of waiver, demand performance by the other.

COUNSEL

Haight, Brown & Bonesteel, Roy G. Weatherup, Michael J. Leahy, Rita Gunasekaran and Christopher P. Yuhl for Defendant and Appellant.

Berger & Norton, Michael M. Berger and Ann E. Kelly for Plaintiff and Respondent.

OPINION

DUNN, J.* —Defendant Standard Fire Insurance Company (hereinafter Standard) appeals from the judgment of October 31, 1989, and from an order of December 19, 1989.

FACTS

Frank Burnaby is the owner of a home located in the Big Rock Mesa area of Malibu, California, which he purchased in October 1979. Burnaby purchased two homeowner's insurance policies from Standard which had effective dates of November 28, 1981, to November 28, 1982, and December 20, 1983, to December 20, 1984, the latter having a $160,000 policy limit for the dwelling and $16,000 for other structures on his property. The policy contained a subrogation clause which provided that the insurer had the right to require an assignment of rights for recovery for a loss to the extent that payment has been made by the company.

Burnaby leased the home to a tenant from June 1982 to June 1983. There was no insurance coverage on the property from November 28, 1982, to December 20, 1983.

On September 9, 1983, the County of Los Angeles sent notices to certain homeowners in the Big Rock Mesa area warning that the county had detected significant evidence that a landslide was developing in the area and advising of a public meeting on September 19, 1983. Burnaby, who did not receive a notice of the meeting, learned of it from a neighbor and attended. At the meeting,

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*Judge of the Municipal Court for the Long Beach Judicial District sitting under assignment by the Chairperson of the Judicial Council.

there was a map indicating the tentative boundaries of the landslide and Burnaby learned that his home was outside of those boundaries. Subsequent to this meeting on December 19, 1983, Burnaby followed the advice he ascertained had been given to neighbors and submitted claims to the County of Los Angeles and other governmental agencies asserting that his house had been damaged in the amount of $1.1 million. He indicated the damage had commenced on or about September 19, 1983, and was continuing. He also made claims against the Flood Control District, the State of California and the Coastal Commission.

Subsequently, Burnaby purchased through his insurance agent, Richard Poast, a Standard homeowner's policy covering the period December 20, 1983, to December 20, 1984. Poast filled out the application for insurance for Burnaby and checked the box "no losses prior to the application."

On May 9, 1984, Burnaby wrote to Standard's parent company, Aetna Life and Casualty, claiming property damage to his home due to destabilization of land resulting in a progressive and continuing landslide. Burnaby gave to the insurance company three statements under oath.

Standard did its investigation of Burnaby's claim and on August 7, 1985, by letter from Attorney Jay Robinson, denied Burnaby's claim. Burnaby subsequently filed his complaint for damages. Although Burnaby's complaint alleged six causes of action, by the time of commencement of trial, there remained only causes of action for breach of contract, breach of the covenant of good faith and fair dealing and breach of fiduciary duty. Prior to trial, the cause of action for violation of section 790.03 of the Insurance Code had been eliminated by a favorable ruling

on Standard's motion for summary adjudication.[1] At the same time, the court had ruled that Burnaby's claim for damages under the 1981-1982 policy of insurance was time barred by the applicable one-year statute of limitations, consequently, no coverage existed under that policy.

Standard contended at the trial, which commenced August 21, 1989, that the damage to Burnaby's property had commenced before December 20, 1983, the effective date of his policy of insurance, and that Burnaby, at the time he applied for the policy, had misrepresented to or concealed from Standard significant facts concerning the condition of his property.

Three weeks into the trial, on September 13, 1989, Division Seven of this court issued its order staying the trial until October 1, 1989, and notifying the trial court and parties that the court was considering a peremptory writ of mandate and directing Standard, as real party in interest, to file its opposition to the petition. On September 25, 1989, this court issued its order that the trial court reinstate the cause of action based upon breach of Insurance Code section 790.03, subdivision (h) or, alternatively, show cause why the cause of action should not be reinstated. On September 29, the trial court reinstated the cause of action and the trial resumed on October 2, 1989.

The jury returned a special verdict on October 27, 1989, finding that Standard had breached the terms of the insurance contract and had acted in bad faith in doing so. The jury awarded damages and prejudgment interest in the

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[1]At law and motion, the court ruled that the case of *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 [250 Cal.Rptr. 116, 758 P.2d 58], mandated dismissal of this cause of action.

sum of $235,990.86 and extracontractual damages in the amount of $600,000. On October 31, 1989, the jury returned its verdict awarding $500,000 as punitive damages. The jury answered a series of questions in rendering its verdict which included the following findings: that Burnaby had not concealed from Standard any material fact he had a duty to disclose; that Standard did not properly deny Burnaby's claim by virtue of the latter's concealment of material facts in his policy application; that the property damage to Burnaby's house first occurred between December 20, 1983, and December 20, 1984, and not prior thereto; that such damage was an unanticipated fortuitous external event; that Standard breached its duty to Burnaby to deal fairly and in good faith and breached the fiduciary duty it owed to Burnaby; that Standard knowingly committed one or more of the unfair and deceptive practices prohibited by Insurance Code section 790.03; and, that Standard was "guilty" (*sic*) of fraud but was "not guilty" (*sic*) of malice or oppression.

Standard's motion for a new trial was granted on the basis of excessive compensatory damages and provided that the motion would be denied if Burnaby consented to a reduction in the amount of such damages from $600,000 to $200,000. Burnaby consented and judgment was entered in the total sum of $1,014,990.31, including interest, costs and disbursements.

Standard timely appealed from the judgment and Burnaby appealed from the conditional order for a new trial.[2]

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[2]Burnaby has abandoned his appeal.

Subsequent to the entry of the jury verdict, Standard filed a motion to amend the judgment to provide for Standard's right of subrogation.[3] On December 19, 1989, that motion was denied on the rationale that any subrogation rights were forfeited when Standard breached the contract and acted in bad faith.

DISCUSSION

I

(1a) Standard's first contention is that there was no insurance coverage for the loss suffered by Burnaby. Standard's argument is that Burnaby's loss is due to earth movement which occurred no later than December 19, 1983. It urges that is contention is borne out by the sworn statements of Burnaby in his loss claim submitted to the government entities. In those statements, Burnaby's claim is that his home was a total loss and that there were cracks in his driveway. Accordingly, urges Standard, the date of loss, for insurance purposes, was in 1983 when Burnaby was without insurance coverage. Standard exhorts this court to so rule "as a matter of law," thus, negating the jury's verdict awarding general and punitive damages to Burnaby. Standard importunes us to, in the alternative, "correct the error of the jury" and determine as a matter of law that the insurance policy should be rescinded due to misrepresentation and concealment by Burnaby on the application for the policy. Specifically, avers Standard, the application did not reveal that Burnaby had made the claim of loss to the

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[3]The record reflects that certain governmental entities posted a substantial sum of money to be divided among the Big Rock Mesa claimants, including Burnaby. The record does not indicate the amount, if any, which Burnaby actually received.

government and stated affirmatively that there had been "no losses" within the preceding three years when in fact, there had been cracks in the earth around Burnaby's property. Standard points us to *Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169 [243 Cal.Rptr. 639], as authority for his stance.

Sogomonian is a case in which the court ruled that the trial court should have entered an order granting summary adjudication of issues establishing that the insurer was entitled to rescission of a policy of insurance on the grounds of concealment and misrepresentation. The case before this court, however, is factually and procedurally very different. In *Sogomonian*, the issue before the court was propriety of a summary judgment ruling as to undisputed facts. This case was before the court for determination of factual matters in a trial. In *Sogomonian*, there was no factual dispute regarding concealment of various material facts by the insured such as subsidence and earth movement which culminated in a landslide onto the property of a downhill neighbor. In the case before the bar, a principal factual issue tried to the jury was whether or not there had been concealment by Burnaby of material facts from the insurer regarding earth subsidence and movement and Burnaby's knowledge thereof. *Sogomonian* is, accordingly, inapposite.

(2) It is well established that material misrepresentation or concealment of material facts such as those recited herein is a proper basis for the rescission of a policy of insurance. (See *Cohen v. Penn Mut. Life Ins. Co.* (1957) 48 Cal.2d 720, 727 [312 P.2d 241].) **(1b)** In this case, however, the jury, after listening to protracted conflicting testimony, made specific factual findings that Burnaby had not

concealed material facts; that his home had not been damaged by earth movement prior to the issuance of the homeowner's insurance policy; and that the damage did occur during the time period that the policy was in force. (3) The scope of the power of review of this court is to ascertain whether there is substantial evidence to support the finding of the jury. "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785 [59 Cal.Rptr. 141, 427 P.2d 805].)

(1c) In this case, there is substantial evidence to support the jury verdict. For example, evidence was presented to the jury that when Burnaby first inquired about insurance, he advised Standard's agent, Poast, that there were some cracks on his property which were located near the Big Rock Mesa slide area. Evidence was presented that Poast was not concerned because he assumed that landslides were not covered in the policy. In addition, evidence was presented that Aetna, the parent of Standard, knew about and was investigating the landslide before Burnaby's homeowner's policy was issued. Moreover, evidence was presented that Burnaby never saw an insurance application, that the "no losses" box on the application was unanswered when submitted to the insurance company by Poast and an underwriter checked the "no losses" box on the application after she received it from agent Poast. Further, the jury was presented evidence that Standard had a previous policy file from 1978 to 1981; had an inspection report for 1982 on the Burnaby home which was prepared by Standard's investigator; and that the home was not damaged by the Big Rock Mesa slide before the policy was issued. Uncontro-

verted testimony was presented to the jury by an expert witness that the landslide manifested itself in the area of Burnaby's home in 1984 and that the cracks in the driveway were probably caused by tree roots. As to the government claim letter and the claims file, Burnaby presented a reasonable and plausible explanation to the jury.

(4) It is well established that the findings of a jury must be given a liberal construction to the end of supporting a judgment. (*Snapp v. State Farm Fire & Cas. Co.* (1962) 206 Cal.App.2d 827, 831 [24 Cal.Rptr. 44].) **(5)** Also, it is established that the question of when appreciable damage occurs to place one on notice of a potentially insured loss is a factual matter for the trier of fact. (*Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 687 [274 Cal.Rptr. 387, 798 P,2d 1230]; *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1318 [278 Cal.Rptr. 301].) **(1d)** Standard asserted it would not have issued a policy of insurance to Burnaby if it had known about the cracks in his home. The obvious answer to such an assertion is that the jury determined there was no misrepresentation or concealment. "[A jury] is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed. [Citation.]" (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 916 [109 Cal.Rptr. 473, 513 P.2d 353].) We are unable to say that the trier of fact in this case indulged in any unreasonable inferences which were unsupported or rebutted by clear, positive and uncontradicted evidence so that its factual findings may not stand.

II

Standard argues that inadmissible prejudicial evidence led to the adverse verdict. In point of fact, Standard says that Richard Leabow, "a purported expert witness," should not have been permitted to testify that it was improper to deny a claim on the basis of nondisclosure of cracks because Leabow was not experienced in and had no knowledge of underwriting. Standard states twice in its opening brief that Leabow and "purported legal expert" Kenneth Chiate were permitted to testify "to the requirements of the law. Neither . . . was qualified to tell the jury that an insurance company must pay a claim if only 20% of the evidence favors a finding of coverage." And again, "[t]he most interesting, and bizarre, testimony of Mr. Leabow dealt with the duty of an insurer to pay a claim. . . . In quantitative terms, a claim should be paid even if 80% of the evidence supports its denial. [Citation.]" Having perused the record carefully, this court is perturbed that Standard should so glaringly misstate the testimony of these two witnesses. The essence of Leabow's testimony *on cross-examination* follows:

"Q. . . . . .

"If . . . the evidence showing lack of coverage appears to be stronger than the evidence showing coverage, do you think an insurer is entitled to deny that claim?

"A. . . . there would have to be a great preponderance of evidence in favor of there being no coverage before you would deny your insured the benefit.

". . . . . .

"Q. . . . does it have to be 90 to 10, or what percentage would you say?

"A. . . . I am not an expert to, you know, to make that determination.

". . . . . .

"Q. How preponderant in your opinion does lack of coverage have to be in order to properly deny a claim where there are dispute[]d facts respecting coverage?

". . . . . .

"A. If the evidence lends itself clearly to percentages, I might suggest something like 80/20.

"I don't think most evidence lends itself to that type of analysis."

Later in cross-examination, in answer to the same question, Leabow stated: "I couldn't give you a percentage. . . . [¶] [I]f they were out looking for facts to deny the claim and they built 80 percent of the facts in their favor and disregarded the information that was available to support the claim, then I would say 80 percent wasn't enough because they haven't done the right investigation."

(6a) Leabow testified to his qualifications at length. He attended Harvard University and UCLA and earned both B.A. and M.B.A. degrees with concentration in finance and insurance. He graduated first in his class and was the recipient of several honors while in college, including being a Ford Foundation Fellow. Leabow spent his life's work in the insurance field in many capacities, from chartered property and casualty underwriter to lecturer in insurance, business, law and economics at the university level. As the trial judge said in a sidebar colloquy: "He's a competent guy." Attorney Chiate's qualifications may be summed up by restating his testimony that he had spent 23 years

specializing in insurance and numerous years advising insurance companies regarding legal claims.

(7) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) It is well established that an expert may give his opinion based upon facts he has not personally observed but which are put to him in the form of hypothetical questions. The value of any opinion of an expert depends, of course, upon the reliability of the source of the facts assumed. (See Evid. Code, § 801.) (8) The qualification of an expert witness is within the sound discretion of the court and its ruling will not be disturbed in the absence of clear abuse. (*Chadock v. Cohn* (1979) 96 Cal.App.3d 205, 208 [157 Cal.Rptr. 640].) And, indeed, the exclusion of admissible expert testimony may constitute reversible error. (See *Lunghi v. Clark Equipment Co.* (1984) 153 Cal.App.3d 485, 490 [200 Cal.Rptr. 387].)

(6b) The determinative issue in this case is whether the two witnesses possessed sufficient skill or experience in the fields of their testimony so that the testimony would be likely to assist the jury in its search for truth. (*Brown v. Colm* (1974) 11 Cal.3d 639, 645 [114 Cal.Rptr. 128, 522 P.2d 688].) We hold that the record establishes that Leabow had sufficient education and experience that there was no abuse of discretion by the court in permitting his testimony. The same is true as regards Chiate. The weight to be given the testimony of each is, of certainty, within the province of the jury.

III

(9) Standard complains that Dennis Evans, a geologist, was not designated as an expert witness yet was permitted to give expert testimony over Standard's objection and in this regard, the trial court erred. Counsel for Burnaby has not made any effort to respond to this contention in even the most cursory fashion, thus, necessitating a search of the record by this court. Our perusal reveals that counsel for Standard has again mischaracterized the testimony of the witness as well as its significance. It appears that Evans was called as a lay witness for the purpose of impeaching, pursuant to Code of Civil Procedure section 2034, subdivision (m),[4] certain assumptions held by Standard's expert witness, Janice Ramsay, regarding Evans's conclusions. The court specifically directed that "[Mr. Evans is] not going to express an opinion. [¶] He's going to be asked if he reached a certain conclusion, yes or no." The record reflects that the questions were put to the witness as directed by the court and his answers were all either "yes" or "no." We find no error.

(10) Standard further urges that it was error "to allow attorney Marlena Mouser . . . to testify concerning an alleged statement by Mr. Richard Poast to her." It argues the testimony was not impeachment testimony, was clearly

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[4]Code of Civil Procedure section 2034, subdivision (m), reads in pertinent part: "A party may call as a witness at trial an expert not previously designated by that party if: . . . (2) that expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion."

hearsay and lacked foundation. Standard does not cite this court to any objection reflected in the record which was made on any of those three grounds. This court's search of the record reveals no such objections. It is elementary that where inadmissible evidence is offered, the party who wishes to raise the admission as a point of error on appeal must object at the trial stating specifically the grounds of the objection and directing the objection to the particular evidence the party seeks to exclude. A failure to object waives the defect. (See *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129 [240 Cal.Rptr. 439]; *Estate of Silverstein* (1984) 159 Cal.App.3d 221, 225 [205 Cal.Rptr. 294].) It follows that even if there were valid grounds at trial for objecting to the testimony of attorney Mouser, which issue we do not reach, Standard failed to preserve it for appeal by making a timely and specific objection.

IV

(11) Standard contends that Burnaby's attorney engaged in conduct and made comments during the trial and at final argument which were prejudicial to Standard's case. It points to the allegedly improper placement of enlargements before the jury, to questions characterized as "argumentative" and to comments to the jury at closing to the effect that the insurance company had destroyed evidence and language which Standard asserts implied that insurance companies generally do not pay claims.

It is elementary that a claim of attorney misconduct will not be considered on appeal unless there is demonstrated in the record a timely and proper objection coupled with a request that the jury be admonished. (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318 [74 Cal.Rptr. 534, 449 P.2d 750]; *Menasco v. Snyder* (1984) 157 Cal.App.3d 729,

732 [203 Cal.Rptr. 748].) Standard, here, has made no such showing. Inasmuch as the adverse effect of misconduct can generally be emasculated by an admonition and/or instruction to the jury to disregard it, it is essential that the trial court be given, by proper objection, an opportunity to act. Failure to do so waives review of the alleged misconduct on appeal. Our own review of the instant record reveals zealous and aggressive conduct by both sides, rather than prejudicial misconduct. Standard's counsel, who raises the issue of attorney misconduct, did, himself, assert in closing argument that Burnaby had committed perjury and indicated that one of Burnaby's expert witnesses was "a professional witness" whose "livelihood is . . . trying to hoodwink people. . . . "

It is also axiomatic that a judgment will not be disturbed on appeal on the basis of attorney misconduct unless, from the entire record, it appears that the misconduct resulted in a miscarriage of justice. (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 157 [119 Cal.Rptr. 245.] Standard has not pointed us to instances in the record and our independent perusal has not revealed any situations in which the nature and seriousness of any remarks or misconduct establish the requisite prejudice. We note that this was a lengthy trial which was aggressively litigated by both sides. An experienced and capable trial judge fairly, impartially and competently controlled the proceedings. We cannot say from our search of this record that there was misconduct, and if there was, that it rose to the level that but for that conduct, a different result would have been probable. We, therefore, hold to be meritless Standard's claim that prejudice resulted from attorney misconduct.

V

(12) Standard claims that the "interruption of the defense" by a stay order and alternative writ from the Court of Appeal was "gravely prejudicial." It argues that, "[c]learly, the trial judge had no jurisdiction to overturn the ruling made by the earlier judge. [Citations.] Rather, the proper remedy of the plaintiff was to appeal from the judgment after trial." Standard argues further that the decisions are in conflict as to whether there exists a cause of action for violation of Insurance Code section 790.03, hence, "[n]onetheless, when one judge has made an order granting summary adjudication of an issue, no other judge has jurisdiction to disturb that order except upon a later appeal after trial . . . ," citing *Conway v. Bughouse, Inc.* (1980) 105 Cal.App.3d 194, 202-203 [164 Cal.Rptr. 585].

Standard's argument addresses the reinstatement on September 19, 1989, of a cause of action for violation of the Unfair Practices Act, Insurance Code section 790.03. The cause of action had been dismissed at law and motion and a later request for reconsideration of the dismissal had been denied. Burnaby sought reinstatement by writ of mandate and on September 25, 1989, an alternative writ was granted ordering reinstatement of the cause of action by the trial court or a showing of why it should not be reinstated. Apparently, Standard's argument is that the trial court, notwithstanding the writ issued to it by this court, was without jurisdiction to reinstate the previously dismissed cause of action and by doing so committed reversible error. In other words, a pretrial error may not be corrected by means of an extraordinary writ. An argument which urges that a case be tried with a known reversible error in place defies logic and is unmeritorious. The trial

judge is duty bound to follow the directive of the appellate court. Moreover, the case cited by Standard for the principle it espouses, *Conway v. Bughouse, Inc., supra*, 105 Cal.App.3d 194, is not authority for that principle. Quite the contrary. "In any case, . . . the party who feels that an injustice has been done by the granting of a partial summary judgment . . . may petition for a writ of mandate. . . ." (*Id.*, at p. 203.) Clearly, the trial court acted properly in following the directive of the appellate court.

VI

(13) Standard claims "the trial court prejudicially erred in submitting the case to the jury on the theory of breach of fiduciary duty." We disagree.

As noted by the trial court and conceded by Standard during a colloquy on jury instructions, at the time this case tried, "a lot of dicta" existed which at least implied that an insurance company stands in a fiduciary relationship with its insured. (See e.g., *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 768 [206 Cal.Rptr. 354, 686 P.2d 1158].) In accordance with such dicta, Burnaby proposed four special jury instructions on the subject of fiduciary duty. The trial court modified the proposed instructions in several respects and, as modified, read these instructions to the jury over Standard's objection.[5]

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[5]As given to the jury, the instructions read as follows:

"Another reason Mr. Burnaby seeks benefits from Standard Fire is breach of the fiduciary duties owed by Standard Fire and its agent to its insured."

"An insurance company is a supplier of a vital public service. As a supplier of a public service the obligations of insurers go beyond

(continued...)

As noted by Standard in its opening brief, since the time of trial, several appellate cases have specifically held that an insurer is not a fiduciary of its insured. (See, e.g., *Thompson v. Cannon* (1990) 224 Cal.App.3d 1413[,] 1418 [274 Cal.Rptr. 608]; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148-1149 [271 Cal.Rptr. 246].) However, even assuming that such cases require that we deem the instructions under review to have been error, Standard has not suffered any prejudice which requires that it be accorded relief on appeal. (See *Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 489 [227 Cal.Rptr. 465].)

The only actual description of a fiduciary set forth in the instructions is the proviso that an insurance company "may not put its own interest above that of the insured's interest." This, however, is clearly a proper statement of law. (See, e.g., 182 Cal.App.3d at p. 489 citing *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818-819 [169 Cal.Rptr. 691, 620 P.2d 141].) Thus, although it may have been error to instruct that Standard was a "fiduciary,"

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[5](...continued)
meeting reasonable expectations of coverage and encompass the responsibilities of a fiduciary."

"A fiduciary owes loyalty and good faith to those who repose trust and confidence in it. [¶] As a fiduciary, an insurance company may not put its own interest above that of the insured's interest."

"Because of the existence of the fiduciary relationship between Mr. Burnaby and Standard Fire, the burden of proof relating to the cause of action of breach of fiduciary duty partially shifts so that Standard Fire has the burden of proving by a preponderance of the evidence that it did not breach its fiduciary duties owed to Mr. Burnaby. This shift in the burden of proof applies only to the cause of action for breach of fiduciary duty and does not apply to the determination of damages.

no prejudice resulted because the jury was not told that Standard should be held to a higher standard than the one actually imposed by law.

The final instruction placed the burden on Standard to prove that it did not breach any fiduciary duties to Burnaby, and specified that the shift in burden did not apply to other causes of action or to the determination of damages. However, the special verdict form establishes that the jury found Standard liable and awarded extracontractual damages on theories of breach of the duty to deal in good faith, commission of unfair and deceptive acts, and breach of fiduciary duty. Because, as discussed above, an insurance company's obligation was properly defined, we see little harm that could have been done by shifting the burden of proof on that one cause of action.

VII

(14) We turn to the issue of whether there was substantial evidence to uphold the jury award of damages in the context of examining Standard's argument that its denial of Burnaby's claim of loss was reasonable and, therefore, the award of damages was improper. We summarize the substantial evidence which was before the jury to support its finding of a bad faith breach of duty to deal reasonably and in good faith with Burnaby rendering Standard liable for compensatory and exemplary damages.

Evidence was presented that in 1983, Burnaby's house was not a part of the Big Rock Mesa slide area which was slow moving and progressive. In December 1983, when he applied for hazard insurance, Burnaby advised Standard's agent, Poast, that his home was near the landslide and that there were cracks on his property. Poast told Burnaby that his proximity to the slide was not a

problem. Although at trial, Poast testified he was unaware of the landslide problems, the internal records of Standard revealed that Gus Pelligrino, the insurance company property specialist, had determined in May 1985 that Poast said he did know about the landslide when the policy was applied for. Also before the jury was testimony that the parent insurance company, Aetna, had 13 other insureds in the slide area. Moreover, before the policy was issued, an Aetna underwriter had called Poast for cross streets so that he could inspect the property. The jury heard testimony that Burnaby had never seen an application for insurance. The application was filled out by Poast and submitted to the insurance company with the question box regarding "no losses" left blank. Ramirez, an Aetna underwriter, who inexplicably had two applications, checked the "no losses" box herself after she received the application from Poast. Also, there was no question on the application regarding whether other claims had been made. In addition, the jury heard evidence that Burnaby previously had hazard insurance with Standard which he had not renewed for a period when the property was occupied by lessees.

The jury had before it evidence from the county improvement district geologic expert, Dennis Evans, as well as Dr. Atwar Singh, another expert, that it was not until 1984 that the landslide expanded westward to the area where Burnaby's home was located. Moreover, the jury had before it evidence that Standard's own expert, Frederich Gebhardt of Leighton and Associates, advised Standard to the same effect in its report to Standard and in addition, advised that the cracks at Burnaby's property were not caused by the landslide and that they, the experts, were unable to determine if Burnaby's property had suffered any landslide damages before the policy was issued. Regarding

the investigation of Burnaby's claim of loss, evidence was presented that Robert Donnelly, the insurance claims investigator who first investigated the claim, reported to Standard on August 10, 1984, that the loss of Burnaby's property was a "delayed reaction" to the slide to the east of Burnaby's property and the repairs would exceed the policy limits. The claim was then reassigned to Donnelly's supervisor, Pelligrino, whose report to the insurance company was that the company might be able to compromise the claim if they received a favorable geologic report from Leighton and Associates. He set the estimated settlement value at $80,000. Evidence was presented to the jury that in April 1985, Pelligrino's report indicated that Leighton and Associates could not determine a date when Burnaby's loss manifested. The jury heard evidence that Pelligrino, on September 24, 1984, sent a notice to his superior, George Spilios, the claims department manager, showing Burnaby's loss date as December 20, 1983, but sent a letter one week later to Burnaby's attorney indicating the company was of the opinion the loss date was September 10, 1983, a date outside of the insurance policy period. The jury heard the testimony of Standard's insurance expert, Bernard Feldman, to the effect that if the insurance company knew of an expert, Dennis Evans, and of his extensive information regarding the landslide, it would be bad faith not to contact and talk to him. The jury further heard Standard's attorney, Jay Robinson, describe Evans as "a geotechnic expert who probably has more knowledge about Big Rock than any of the other experts. . . ." Evidence was presented that Standard did not contact Evans although Standard knew about him and although he was available to Standard and had been contacted by other insurers. The evidence of these

facts is a sufficient underpinning, we hold, in support of the award by the jury of damages.

VIII

(15a) Standard argues that "it was manifest error for the trial judge to submit the claim for punitive damages on a fraud theory to the jury" because it was based upon a jury finding of the tort of fraud. Standard argues that Civil Code section 3294, subdivision (e), is a codification of the common law tort of fraud which was not pleaded by Standard, hence, no judgment could be returned on that theory. Although novel, Standard's argument is specious. First, Standard does not point this court to a timely and specific objection made to any evidence presented, any jury instructions given or any argument made to the jury on this issue. On that sole basis, we need not address the issue. Nonetheless, we observe the jury verdict is not a product of improper instruction to the jury or submission to the jury on a theory of fraud. The jury considered, inter alia, the cause of action pleaded for violation of Insurance Code section 790.03. The jury concluded that there was no "malice" or "oppression" but that Standard was "guilty" of fraud. Civil Code section 3294, subdivision (a), provides for sanctions by way of exemplary damages where bad faith conduct occurs in a context of malice, fraud or oppression. (*Egan v. Mutual of Omaha Ins. Co., supra*, 24 Cal.3d at p. 820.) The term "fraud" under Civil Code section 3294, subdivision (c)(3), means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." This is not fraud in the common law tort context. It is not a codification of the tort of fraud. There

is no necessity for Burnaby to plead and prove, as Standard asserts, all of the elements of a tort cause of action for fraud, including detrimental reliance.

(16) Where an action is ex delicto in nature, exemplary damages are properly awardable. An action is ex delicto if it arises out of fault, misconduct or malfeasance and includes the wrongful taking of a person's property or injury to it. (See 1A C.J.S., Actions, § 4, subd. (b), p. 309; Black's Law Dict. (5th ed. 1979) p. 509, col. 1.) **(15b)** In the case of *Haigler v. Donnelly* (1941) 18 Cal.2d 674 [117 P.2d 331], plaintiffs did not plead a cause of action in fraud. Rather, their first cause of action was a common count for money had and received and the second was for conversion. Our Supreme Court held at page 681: "Exemplary damages are properly awardable [under Civil Code section 3294] in an action for conversion, given the required showing of malice, fraud or oppression. [Citations.]" The conversion in the *Haigler* case was the withholding from plaintiffs by defendant of a sum of money claimed by defendant-broker to be a commission to which she was entitled. The evidence was sufficient, said the court, to uphold the trial court's conclusion that the defendant's refusal to account was not made in good faith and was, instead, a ploy to obtain plaintiffs' money by trickery and falsehood. Similarly, in the case of *Arzaga v. Villalba* (1890) 85 Cal. 191 [24 P. 656], a father was held to have committed the tort of conversion by refusing to return to his daughter her furniture and clothes upon her demand. Our Supreme Court held that exemplary damages were properly awarded to plaintiff in the fraud context of Civil Code section 3294. Both *Haigler* and *Arzaga, supra*, accordingly are illustrative of the principle that no cause of action for the tort of fraud need be pleaded and proved as a condition

precedent to an award of damages pursuant to Civil Code section 3294. Similarly in this case, there is ample evidence, which is reviewed hereinafter, to justify the jury award of exemplary damages on the basis of intentional misrepresentation and/or concealment of a material fact with intent to deprive respondent of property, to wit, insurance proceeds, thereby constituting fraud within the meaning of Civil Code section 3294, subdivision (a).

IX

(17a) We are called upon to determine the issue of whether an insurer who is determined at trial to have unreasonably and in bad faith declined to pay a claim of loss by its insured is entitled to assert subrogation rights after the insured has successfully sued on that claim of loss and recovered from a third party tortfeasor. We hold in the negative.

(**18**) Subrogation is the right of an insurer to substitute itself in place of its insured to seek recovery from the legally responsible third party tortfeasors for loss paid by the insurer to the insured. (*Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 488 [255 Cal.Rptr. 40.] That is to say, an insurer, upon paying a loss, is subrogated in a corresponding amount to the insured's right of legal action against any other person whose tortious action has caused the loss. (See 16 Couch on Insurance (2d ed. 1983) § 61:1, p. 75.)

(**17b**) In the instant case, Standard contends that it is entitled to subrogation rights by virtue of the contract of insurance between Burnaby and itself and/or by operation of law. Standard urges that if its right to subrogation is not protected, Burnaby will receive a windfall in the form of a double recovery.

(19) The right to subrogation arises by contract and upon equitable principles. (17c) In this case, the subrogation clause in the insurance policy provided that: "Any *insured* may waive in writing before a loss all rights of recovery against any person. IF NOT WAIVED, WE MAY REQUIRE AN ASSIGNMENT OF RIGHTS OF RECOVERY FOR A LOSS TO THE EXTENT THAT PAYMENT IS MADE BY US. [¶] IF AN ASSIGNMENT IS SOUGHT, ANY *INSURED* SHALL SIGN AND DELIVER ALL RELATED PAPERS AND COOPERATE WITH US IN ANY REASONABLE MANNER." (Original italics.)

The general rule is that an insurer is subrogated in an amount equivalent to that which it has paid. Until the insurer had paid the claim under the policy, no rights accrue to it. (*Hausmann v. Farmers Ins. Exchange* (1963) 213 Cal.App.2d 611, 615 [29 Cal.Rptr. 75]; see also *Patent Scaffolding Co. v. William Simpson Constr. Co.* (1967) 256 Cal.App.2d 506, 509 [64 Cal.Rptr. 187].) Thus, the right of subrogation does not arise until there has been a payment by the insurer under the policy of insurance. It is undisputed that in the instant case, no payment has been made by Standard. Moreover, the language of assignment in the contract of insurance may be reasonably interpreted to hold that payment of benefits for a loss covered under the policy is a condition precedent to the insurer requiring the execution by the insured of documents of assignment of rights against the tortfeasor. (20) It is basic that when the insurer and insured accept the policy, each accepts the conditions imposed by the terms of the policy. If one party fails in some substantial respect to comply with the terms, that party cannot, in the absence of waiver, demand performance by the other.

(17b) It is undisputed that Standard, in this case, (1) was presented a claim of loss and declined to honor it; (2) was informed and invited to participate in the prosecution of the suit against the tortfeasors; (3) provided no aid to Burnaby in his prosecution of the claim; (4) took no affirmative steps such as intervention to protect its interest; and (5) was determined by the jury to have acted unreasonably and in bad faith in denying its insured's claim of loss. Under this set of facts, we find no merit to Standard's claim that it possesses a right of contractual subrogation that may be asserted. Standard has no right, moral or equitable, to lie quiescent and require that another protect its rights. A subrogation right may be waived expressly or by implication. (*Lossman v. City of Stockton* (1935) 6 Cal.App.2d 324, 332 [44 P.2d 397].) We hold that the conduct of Standard in this instance constituted a failure to properly assert its right of subrogation in compliance with the policy of insurance thus waiving that right. On the rationale that failure to make payment is a waiver, we hold that subrogation does not apply in an instance, as here, where the insurer has refused to pay a claim of loss subsequently judicially determined to be appropriate.

Standard may not, moreover, assert a right of subrogation upon equitable principles. Although the policy of insurance determines the rights of the insurer regarding subrogation, in the absence of a contract of insurance, the right arises pro tanto upon payment. In the instant case, there was no payment. Accordingly, there is no subrogation right. (See *Karaty v. State Farm Mut. Auto. Ins. Co., supra*, 207 Cal.App.3d at pp. 488-489.) This principle is particularly applicable considering the jury determination of Standard's lack of good faith dealing. The essential underlying philosophy of subrogation is to do justice vis-a-vis the

parties by requiring payment from the person primarily responsible for the loss. (See 16 Couch on Insurance, *supra*, § 61:18, p. 93.)

In *Kardly, supra*, where an insurer's subrogation rights were held to have been lost with respect to certain of the insured's losses which were not paid, the court discussed *Powers v. Calvert Fire Ins. Co.* (1950) 216 S.C. 309 [57 S.E.2d 638] to which Burnaby refers. In that case which involved an auto collision, the insured's claim was denied by the insurer. The insured sued the alleged tortfeasor, as in this case, and terminated its suit by settlement as occurred in the instant case. The insurer, as here, took no part in the insured's action notwithstanding its subrogation rights pursuant to a clause in the policy of insurance. As in this case, the insured sued the insurer for damages for breach of the policy of insurance. On the issue of subrogation, the court observed that an insurer "cannot sit down and hold its hands and purse and thereafter escape liability for fulfillment of its contract by reason of the insured's effort, after fair notice, to recoup his loss by litigation against a wrongdoer." (*Id.*, at p. 642.) The court held that subrogation arises upon payment and in default of that is not available where there is conduct which amounts to breach of the contract of insurance inasmuch as it results in a waiver of the right of subrogation.

We observe, finally, that there has been in this case no showing of a specific sum of money paid by tortfeasors to Burnaby. The evidence makes clear there has been some pecuniary recovery by Burnaby from a third party and to that extent, perhaps, a "double recovery" in contravention of public policy. Nonetheless, by our holding in this case, we endorse the countervailing policies of good faith and

fair dealing and proper attention to and assertion of legal rights, inter alia. Accordingly, we hold the trial court properly ruled that Standard forfeited its subrogation rights given the jury determination that Standard had breached its contract of insurance with Burnaby and had engaged in tortious conduct justifying an award of exemplary damages.

X

We find the other brief contentions of Standard unmeritorious.

DISPOSITION

The judgment and the order under review are affirmed.

Ortega, Acting P.J., and Masterson, J., concurred.

B-1

No. 2/1 B047665 - S033800

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
SEP - 2 1993
Robert Wandruff Clerk
DEPUTY

FRANK BURNABY, Respondent

v.

STANDARD FIRE INSURANCE COMPANY, Appellant

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Apellate [*sic*] Reports the opinion in the above-entitled appeal filed June 1, 1993, which appears at 16 Cal.App.4th 135. (Cal. Const., Art. VI, Section 14, rule 976, Cal. Rules of Court.)

Kennard, J. is of the view the opinion should remain published.

LUCAS

Chief Justice

APPENDIX B

C-1

FOR COURT USE ONLY

FILED
JAN 3 1990
FRANK S. ZOLIN, COUNTY CLERK
By S. WALL, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

FRANK BURNABY PLAINTIFF(S) vs ST. STANDARD FIRE INSURANCE COMPANY AND DOES 1-25 DEFENDANT(S)	CASE NUMBER WEC 089584 JUDGMENT ON SPECIAL VERDICT

The action came on reguarly for trial on August 21, 1989, in Department West P of the Superior Court, the Honorable Richard G. Harris Judge Presiding; the plaintiff(s) appearing by attorney(s)

A. Tod Hindin and
FADEM, BERGER & NORTON
by: George M. Soneff

and the defenant(s) appearing by attorney(s)

HAIGHT, BROWN & BONESTEEL
by: Christopher P. Yuhl and Roy G. Weatherup

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

(OVER)

Judgment entered pursuant to stipulation and order of court dated January 12, 1990.
Attest: FRANK S. ZOLIN, County Clerk
By: /s/ Sherry Hall, Deputy, January 12, 1990

APPENDIX C

JUDGEMENT ON SPECIAL VERDICT

(Here quote entire Special Verdict verbatim)

TITLE OF COURT AND CAUSE

(1) Did FRANK BURNABY conceal any material fact from STANDARD FIRE INSURANCE COMPANY that he had a duty to disclose to it?

Yes ✓ No ____

(2) Did defendant STANDARD FIRE INSURANCE COMPANY properly deny Mr. BURNABY'S claim and rescind the insurance policy issued to him (the policy with an effective date of December 20, 1983), by virtue of MR. BURNABY's concealment of material facts in his application for the policy?

Yes ____ No ✓

If your answer to this question is "yes," sign and return this verdict form. If it is "no," proceed to question No. 3.

(3) Did the property damage to MR. BURNABY's house for which he made claim first occur prior to December 20, 1983?

Yes ____ No ✓

If your answer to this question is "yes," sign and return this verdict form. If it is "no" proceed to question No. 4.

(4) Did the property damage to MR. BURNABY's house for which he made claim first occur between December 20, 1983 and December 20, 1984?

Yes ✓ No ____

If your answer to this question is "no," sign and return this verdict form. If it is "yes," proceed to question No. 5.

(5) Was the occurence of loss or damage to the plaintiff's property during the term of the plantiff's insurance policy an unanticipated fortuitous external event?

Yes ✓ No ____

If you answer Question No. 5 "no," sign and return the verdict. If you answer Question No. 5, "yes," Question No. 6.

(6) Did the plaintiff, FRANK BURNABY, perform the terms and conditions of the insurance contract on his part to be performed under the insurance contract which were not excused or waived?

Yes ✓ No ____

If you answer Question No. 6 "no", sign and return the verdict. If you answer Question No. 6 "yes", then answer Question No. 7.

(7) Did defendant, STANDARD FIRE INSURANCE COMPANY breach the insurance contract that is issued to the plaintiff?

Yes ✓ No ____

If you answer Question No. 7 "no", sign and return this verdict. If you answer Question No. 7 "yes", then answer Question No. 8.

(8) What is the amount of damages which MR. BURNABY is entitled to recover under the terms of his contract with STANDARD FIRE INSURANCE COMPANY, including interest at 7%?

$- 235990.86 -

(9) Did the defendant, STANDARD FIRE INSURANCE COMPANY breach its duty to deal fairly and in good faith with the plaintiff?

Yes ✓ No _____

If you answer Question No. 9 "no", then answer Question No. 11. If you answer Question No. 9 "yes", then answer Question No. 10.

(10) Was the defendant, STANDARD FIRE INSURANCE COMPANY's breach of the duty of good faith and fair dealing a legal cause of loss or damage to the plantiff?

Yes ✓ No _____

(11) Did the defendant, STANDARD FIRE INSURANCE COMPANY knowingly commit one or more of the unfair and deceptive practices prohibited by California Insurance Code Section 790.03, the Unfair Practices Act?

Yes ✓ No _____

If your answer to Question No. 11 is "no", proceed to Question No. 13. If you answer Question No. 11 "yes" as to plaintiff, then answer Question No. 12.

(12) Was the defendant, STANDARD FIRE INSURANCE COMPANY's knowing commission of an unfair and deceptive practice prohibited by the Unfair Practices Act, Section 790.03 of the California Insurance Code, a legal cause of loss or damage to the plaintiff?

Yes ✓ No _____

(13) Did STANDARD FIRE INSURANCE COMPANY have a fiduciary relationship with the Plaintiff?

Yes ✓ No _____

If your answer to Question No. 13 is "no", proceed to Question No. 16. If you answer Question No. 13 "yes" as to plaintiff, then answer question no. 14.

(14) Did the defendant, STANDARD FIRE INSURANCE COMPANY breach the fiduciary duty it owed to the plaintiff?

Yes ✓ No ____

If you answer Question No. 14 "no" then proceed to Question No. 16. If you answer Question No. 14 "yes", then answer Question No. 15.

(15) Was the defendant, STANDARD FIRE INSURANCE COMPANY's breach of fiduciary duty a legal cause of loss or damage to the plaintiff?

Yes ✓ No ____

(16) What do you find to be the total amount of damages suffered by the plaintiff legally resulting from the breach by STANDARD FIRE INSURANCE COMPANY of the duty to deal in good faith and fairly with the plaintiff, or from STANDARD FIRE INSURANCE COMPANY's commission of the unfair and deceptive acts prohibited by California Insurance Code Section 790.03(h), the Unfair Practices Act, or by the breach of the fiduciary duty STANDARD FIRE INSURANCE COMPANY owed to the plaintiff, excluding the damages listed in Question No. 8, if any, and excluding punitive damages?

$ 600,000.00] reduced to $200,000.- by plaintiff's consent to reduction

Dated: 10/27/89

FOREPERSON

We, the jury in the above-entitled case, find the following Special Verdict on the questions submitted to us:

Question No. 1: Was STANDARD FIRE INSURANCE COMPANY guilty of malice?

Answer "yes" or "no".

Answer: No

Question No. 2: Was STANDARD FIRE INSURANCE COMPANY guilty of fraud?

Answer "yes" or "no".

Answer: Yes

Question No. 3. Was STANDARD FIRE INSURANCE COMPANY guilty of oppression?

Answer "yes" or "no".

Answer: No

Question No. 4: What is the amount of punitive damages, if any, to be imposed against the defendant, STANDARD FIRE INSURANCE COMPANY?

Answer: $ 500,000.00

Dated: 10/31/89

FOREPERSON

It appearing by reason of said special verdict that:

FRANK BURNABY is entitled to judgment against The Standard Fire Insurance Company and Does 1-25,

Now, therefore, it is ordered, adjudged and decreed that said plaintiff, Frank Burnaby

have and recover from said defendants, The Standard Fire Insurance Company and Does 1-25, the sum of $1,335,990.86.

$935,950.86

with interest at the rate of ~~seven~~ ten per cent per annum from the date of the verdict until paid together with INTEREST costs and disbursements amount to the sum of $ 79,000.45

Dated October 31, 1989

JUDGE OF THE SUPERIOR COURT
RICHARD G HARRIS

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 1 DATE: 06/30/93

Haight, Brown & Bonesteel
Roy G. Weatherup
1620 26th Street
Suite 4000 North
Santa Monica, CA 90404

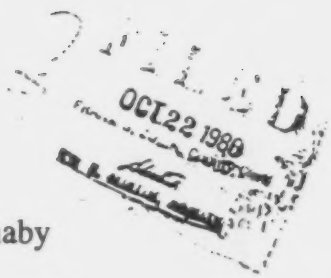
RE: Burnaby, Frank
vs.
Standard Fire Insurance
2 Civil B047665
Los Angeles NO. WEC089584

THE COURT:
Petition for rehearing denied.

APPENDIX D

Law Offices
Fadem, Berger & Norton
A Professional Corporation
501 Santa Monica Boulevard
Post Office Box 2148
Santa Monica, California 90406
Telephone (213) 451-9951

Attorneys for Plaintiff Frank Burnaby



SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

FRANK BURNABY, Plaintiffs, vs. THE STANDARD FIRE INSURANCE COMPANY AND DOES 1 - 25, Defendants.	No. WEC089584

SECOND AMENDED COMPLAINT FOR:

- BREACH OF INSURANCE POLICY;
- BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING;
- BREACH OF FIDUCIARY DUTY;

APPENDIX E

- BREACH OF STATUTORY DUTY;
- INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; AND
- FRAUD

Plaintiff alleges:

ALLEGATIONS OF BASIC FACTS

The Parties

1

Frank Burnaby owns the home at 20743 Rockpoint Road, Malibu, California (the Subject Property).

2

The Standard Fire Insurance Company is a Connecticut corporation doing business in California.

3

The true names or capacities, whether individual, corporate, associate, or otherwise of Does 1 through 25 are unknown to Mr. Burnaby, who sues these defendants by fictitious names. Mr. Burnaby will amend this Complaint to show the defendants' true names and capacities when ascertained.

4

Each defendant is the agent of the other defendants and each, acting within the purpose and scope of that agency, contributed to Mr. Burnaby's damage. Each defendant ratified and approved the acts of the other defendants. (The Standard Fire Insurance Company and Does 1 through 25 are referred to as Standard.)

The Policies

5

On or about December 20, 1983, Standard issued policy No. 214 HO 780745 PCS-V (the 1983 Policy) to Mr. Burnaby, insuring the Subject Property against all risk of physical loss. (Exhibit A) Standard also insured the Subject Property from November 28, 1981 to November 28, 1982 under policy No. 83 HO 755929 PCS (the 1981 Policy). (Exhibit B) (Collectively, Exhibits A and B are the Policies.)

6

Mr. Burnaby bought the Policies from Standard's agent, Dick Poast, based on Mr. Poast's representations that the Policies would provide insurance against physical injury to the Subject Property, including loss of use.

7

Mr. Burnaby has paid all premiums and performed all conditions to be performed by him under the provisions of the Policies.

Causes of Damage to the Subject Property

8

The Subject Property is on a hillside in the Big Rock area of Malibu (the Hillside). The Hillside is the site of ancient landslide. As early as 1978, that landslide reactivated, destabilizing the land under the Subject Property.

9

Reactivation of the landslide was proximately caused by the negligence of third parties who:

- removed support for the Subject Property by cutting into the Hillside for construction of Pacific Coast Highway;
- removed slide debris from Pacific Coast Highway without providing replacement stabilization;
- permitted construction of homes on a known landslide without a sewer system; and
- introduced water into the subsurface of the Hillside without an adequate means of removing it.

10

In September 1983, the County of Los Angeles wrote letters to Big Rock area homeowners warning about the threat to their safety and property from the Big Rock Mesa landslide. Mr. Burnaby did not receive a warning letter. At County conducted meetings, Mr. Burnaby was shown maps of the Big Rock Mesa landslide which showed the Subject Property outside the landslide area.

11

In or around November 1983, Mr. Burnaby telephoned Standard's agent, Dick Poast of Valley Heart Insurance Agency, to verify that his homeowners insurance coverage was in force. Mr. Burnaby was told that his 1981 Policy had lapsed in 1982. He requested that it be reinstated.

12

When Mr. Burnaby requested reinstatement, and in telephone calls with Mr. Poast and his employees during November and December 1983, Mr. Burnaby explained that he lived near, but had been told his property was not within, the boundaries of the Big Rock Mesa landslide. He said that there was some minor cracking in and around his home. Mr. Burnaby requested that this information be given to Standard as part of his application for reinstatement of coverage. Mr Poast told Mr. Burnaby that his request had been complied with and that there was no problem reinstating his homeowners insurance with Standard.

13

Standard insured 14 other properties in the Big Rock area. When Standard sold Mr. Burnaby the 1983 Policy providing homeowners insurance coverage, Standard knew about the Big Rock Mesa landslide.

14

As geotechnical experts studied the Big Rock Mesa landslide, they revised their understanding of the landslide boundary. The Big Rock Mesa landslide is now known to include the Subject Property within its boundaries.

The Claim

15

Beginning in early 1984, Mr. Burnaby noticed that cracking in and around his home had become worse. Larger, more numerous cracks appeared in the walls, brickwork, and foundation of the Subject Property. Mr. Burnaby believed this damage was caused by landsliding. That damage continues and worsens daily.

16

On May 9, 1984, Mr. Burnaby wrote Standard that:

- his home had suffered damage from the Big Rock Mesa landslide which:
  - — may result in total loss; and
  - — will likely force him to relocate; and
- he was making a claim for that loss.

17

The structural damage from the landslide is progressive and continuing. The land underlying the Subject Property is destabilized. Mr. Burnaby has lost full use of his home.

Movement continues.

Mr. Burnaby can neither sell nor rent his home, which continues to deteriorate.

FIRST CAUSE OF ACTION

(For Breach of Insurance Policy)

18

Mr. Burnaby incorporates paragraphs 1 through 17.

19

The Policies insure against loss caused by the actions of third parties. Where a proximate cause of damage is third party acts, such acts are insured risks within an "all physical loss" property damage policy, even though the mechanism of loss is an excluded peril.

20

Because damage has been continuous, progressive and deteriorating during more than one Policy period, Standard is liable under both Policies.

21

Mr. Burnaby's losses, proximately caused by the actions of third parties, are insured physical losses. Mr. Burnaby is entitled to benefits under the Policies.

22

The Policies require Standard to pay for insured losses to a maximum of:

- $176,000 (plus increases in coverage described at page 10, paragraph 15 of Exhibit B) for damage to or loss of Mr. Burnaby's home and appurtenant structures; and
- $32,000 for loss of use.

23

The cost to repair the landslide damage to the Subject Property by stabilizing the underlying land exceeds the maximum limits of insurance coverage under the Policies. Therefore, a Policy limits payments was due [*sic*] when Mr. Burnaby made his claim.

24

Standard knew Mr. Burnaby was living in a dangerous situation. But, for more than 3 months, Standard did not even acknowledge receipt of Mr. Burnaby's claim. Standard did not promptly investigate Mr. Burnaby's loss.

For more than a year, Standard refused to acknowledge or deny coverage for Mr. Burnaby's loss.

25

Standard knew it had insured the Subject Property from 1981 through 1982. Standard knew the Big Rock Mesa landslide was moving in 1981 and continuously thereafter.

But on August 7, 1985, Standard denied coverage and attempted to rescind the 1983 Policy.

26

Standard's delay, denial of the Policies' benefits, and attempted rescission are a breach of its duties under the Policies. That breach caused Mr. Burnaby to suffer damages in excess of $208,000.

SECOND CAUSE OF ACTION

(Fraud)

27

Mr. Burnaby incorporates paragraphs 1 through 17 and 19 through 26.

28

Standard, through the sales presentation of its agent Dick Poast, represented to Mr. Burnaby that he was insured against physical injury to or destruction of the Subject Property, including loss of use of the Subject Property.

29

Standard made these representations to induce Mr. Burnaby to enter into contracts for insurance and to pay premiums for the Policies. Mr. Burnaby relied on these representations, entered into the contracts of insurance, paid

premiums, and, believing that coverage was provided, refrained from obtaining other insurance.

30

Standard never intended to comply with its representations and, in fact, has consistently refused to do so. Standard made its representations with the intent to defraud Mr. Burnaby. Mr. Burnaby was unaware of Standard's intention not to perform pursuant to its representations. Under the circumstances, Mr. Burnaby's reliance on Standard's representations was reasonable.

31

As a proximate result of Mr. Burnaby's reasonable reliance on Standard's representations and Standard's intention, at the time those representations were made, not to perform them, Mr. Burnaby has sustained damages under the Policies in excess of $208,000, plus interest, and suffered anxiety, worry, and mental and emotional distress. Mr. Burnaby is also entitled to damages for his emotional distress.

32

Standard's fraud also entitles Mr. Burnaby to recover punitive damages under CCP §3294.

THIRD CAUSE OF ACTION

(For Breach of Duty of Good Faith and Fair Dealing)

33

Mr. Burnaby incorporates paragraphs 1 through 17, 19 through 26, and 28 through 32.

34

There is an implied covenant of good faith and fair dealing in the Policies that Standard will not do anything to prevent Mr. Burnaby from receiving the benefits he is entitled to under the Policies.

35

Standard breached the implied covenant of good faith and fair dealing in the Policies by:

- failing to investigate the causes of Mr. Burnaby's loss and his claim for benefits;
- failing to reasonably and promptly process Mr. Burnaby's claim for benefits;
- failing to provide a reasonable explanation for refusing to pay Mr. Burnaby for covered losses;
- failing to make a good faith attempt to reach a prompt, fair, and equitable settlement of the Burnaby claim when liability was reasonably clear;
- failing to make payments under the Policies when Mr. Burnaby was entitled to such payments;
- causing Mr. Burnaby to remain in a home which endangers his health and safety; and
- causing Mr. Burnaby to hire attorneys to bring this action to recover the benefits due under the Policies.

36

Standard's breach of the implied covenant of good faith and fair dealing has caused Mr. Burnaby to suffer financial hardship and anxiety, worry, and mental and emotional distress.

37

Mr. Burnaby's damages under the Policies exceed $208,000, plus interest.

Mr. Burnaby is also entitled to damages for his emotional distress.

38

Standard knows its breach of its duty of good faith and fair dealing is causing Mr. Burnaby financial hardship and emotional distress, in violation of Mr. Burnaby's rights under the Policies.

Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him. Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages.

FOURTH CAUSE OF ACTION

(For Breach of Fiduciary Duty)

39

Mr. Burnaby incorporates paragraphs 1 through 7, 19 through 26, 28 through 32, and 34 through 38.

40

Standard's issuance of the Policies to Mr. Burnaby and acceptance of premiums from Mr. Burnaby created a fiduciary duty from Standard to Mr. Burnaby.

41

Mr. Burnaby placed his trust and confidence in Standard, believing that the Policies would provide:

- coverage for repair of physical damage to the Subject Property;
- financial security in the event of catastrophic loss of the Subject Property; and
- peace of mind.

42

Standard breached its fiduciary duty by:

- failing to investigate the causes of Mr. Burnaby's loss and his claim for benefits;
- failing to reasonably and promptly process Mr. Burnaby's claim for benefits;
- failing to provide a reasonable explanation for refusing to pay Mr. Burnaby for covered losses;
- failing to make a good faith attempt to reach a prompt, fair, and equitable settlement of the Burnaby claim when liability was reasonably clear;
- failing to make payments under the Policies when Mr. Burnaby was entitled to such payments;

- causing Mr. Burnaby to remain in a home which endangers his health and safety; and
- causing Mr. Burnaby to hire attorneys to bring this action to recover the benefits due under the Policies.

43

Standard's breach of its fiduciary duty has caused Mr. Burnaby to suffer financial hardship and anxiety, worry, and mental and emotional distress.

44

Mr. Burnaby's damages under the Policies exceed $208,000, plus interest.

Mr. Burnaby is also entitled to damages for his emotional distress.

45

Standard knows its breach of its fiduciary duty is causing Mr. Burnaby financial hardship and emotional distress, in violation of Mr. Burnaby's rights under the Policies.

Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him. Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages.

FIFTH CAUSE OF ACTION

(For Breach of Statutory Duty)

46

Mr. Burnaby incorporates paragraphs 1 through 17, 19 through 26, 28 through 32, 34 through 38, and 40 through 45.

47

Standard is regulated by California Insurance Code §790.03 which was enacted to protect purchasers of insurance such as Mr. Burnaby from unfair and deceptive practices in the business of insurance.

48

Standard knowingly violated its statutory duties to Mr. Burnaby by:

- misrepresenting to Mr. Burnaby pertinent facts about the coverage under the Policies (§790.03(h)(1));
- failing to acknowledge and act promptly on Mr. Burnaby's communications regarding his claim under the Policies (§790.03(h)(2));
- failing to adopt and implement reasonable standards for prompt investigation of Mr. Burnaby's claim (§790.03(h)(3));
- failing to affirm or deny coverage within a reasonable time (§790.03(h)(4));

- failing to offer Mr. Burnaby a prompt, fair, and equitable settlement for losses under the Policies as soon as the liability for those losses became reasonably clear (§790.03 (h)(5));
- failing to promptly provide a reasonable explanation for refusing to pay Mr. Burnaby for covered losses (§790.03(h)(13)); and
- causing Mr. Burnaby to hire attorneys to compel recovery of proceeds due under the Policies (§790.03 (h)(6)).

49

Standard's knowing violation of its statutory duties has caused Mr. Burnaby to suffer financial hardship and emotional distress.

50

Mr. Burnaby's damages under the Policies exceed $208,000, plus interest.

Mr. Burnaby is also entitled to damages for his emotional distress.

51

Standard knows that its violation of its statutory duties is causing Mr. Burnaby financial hardship and emotional distress, in violation of Mr. Burnaby's rights under the Policies.

Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him.

Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages.

SIXTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

52

Mr. Burnaby incorporates paragraphs 1 through 17, 19 through 26, 28 through 32, 34 through 38, 40 through 45, and 47 through 51.

53

In view of its knowledge of Mr. Burnaby's entitlement to benefits and need for prompt payment of benefits under the Policies, Standard's refusal to pay benefits is outrageous conduct, which was likely to cause Mr. Burnaby financial hardship with consequent emotional distress.

54

By refusing to pay benefits, Standard acted intentionally or with reckless disregard of the probability that Mr. Burnaby would suffer emotional distress.

Standard's refusal has caused Mr. Burnaby to suffer emotional distress.

55

Mr. Burnaby is entitled to damages for his emotional distress.

WHEREFORE, Mr. Burnaby prays for:

1. Proceeds due under the Policies.
2. Damages for fraud according to proof, but in excess of $208,000.

3. Damages for breach of the Policies according to proof, but in excess of $208,000.

4. Damages for breach of fiduciary duty according to proof, but in excess of $208,000.

5. Damages for breach of the duty of good faith and fair dealing according to proof, but in excess of $208,000.

6. Damages for breach of statutory duties in an amount according to proof, but in excess of $208,000.

7. Interest on the damages from May 9, 1984.

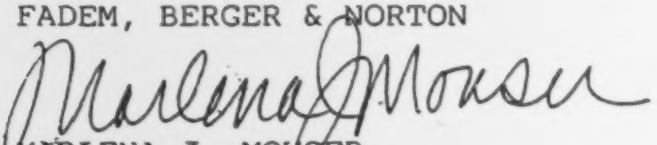
8. Damages for emotional distress.

9. Punitive damages.

10. Costs of suit.

11. Such other relief as the Court deems just.

FADEM, BERGER & NORTON



MARLENA J. MOUSER
Attorneys for Plaintiff
Frank Burnaby

BAJI 14.71 (1988 Revision)

If you find that plaintiff suffered damages as a [legal] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evedence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [despicable conduct which is carried on by the defendant with a willful and conscious disregard for the [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] is aware of the probable dangerous consequences of [his] conduct and willfully and deliberately fails to avoid those consequences.]

["Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.]

["Despicable conduct" is conduct which is so [vile,] [base,] [contemptible,] [miserable,] [wretched,] [or] [loathsome] that it would be looked down upon and despised by ordinary decent people.]

["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of

thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound descretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.

[(3) The amount of actual damages.]

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

The federal question in issue in the petition for writ of certiorari was timely and properly raised in the appellant's opening brief and petition for review filed by the Standard Fire Insurance Company on February 18, 1993, and July 9, 1993, respectively.

The Award of Punitive Damages, Based on a Finding of "Fraud," Must Be Reversed, Because No Fraud Claim Was Proved, or Even Pleaded, and Because It Was Unconsititutional.

The most unjust and pernicious aspect of the present judgment is the half million dollar award of punitive damages. This award is based on a jury finding of "fraud," even though the plaintiff never properly pleaded any such cause of action, withdrew his claim of "fraud" before trial, and never presented any evidence in support of the theory, and never asked that the theory be presented to the jury.

Civil Code section 3294(a) authorizes damages. It provides that, "where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Since the jury exonerated the defendant with respect to oppression and malice, it is necessary only to decide whether the award of punitive damages is justified on a "fraud" theory.

Civil Code section 3294(e) defines "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." This definition appears to be a codification of the common law

definition of fraud, as found in cases such as *Lesperance v. North American Aviation, Inc.* 217 Cal.App.2d 336 (1963), and *Okun v. Morton*, 203 Cal.App.3d 805, 828 (1988).

Of course, there is no such thing as a cause of action for punitive damages. Rather, a claim for punitive damages is merely incident to some other cause of action. *Orient Handel v. United States Fidelity & Guaranty Company*, 192 Cal.App.3d 684,697 (1987). Although fraud alone is an adequate ground for awarding punitive damages, the plaintiff must prove every essential element of fraud, including justifiable reliance. 192 Cal.App.3d at 697.

Fraud must be pleaded with particularity. *Scafidi v. Western Loan & Building Company,* 72 Cal.App.2d 550, 553 (1946). The rule that fraud must be pleaded with specificity is the "last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings." *Committee on Children's Television, Inc. v. General Foods Corporation,* 35 Cal.3d 197, 216-217 (1983). The specificity requirement also serves the purpose of notifying the defendant of certain definite charges, so that the defendant will be able to meet them intelligently. 35 Cal.3d at 216.

Where a complaint contains no allegation of oppression, fraud, or malice, and no demand for punitive damages, there is no basis for awarding any such damages. *Lorenz v. Hunt*, 89 Cal.App. 6, 15-16 (1928); *Syfert v. Solomon,* 95 Cal.App. 228, 237 (1928); *Hall v. Berkell,* 130 Cal.App.2d 800, 804-805 (1955); *Goodwin v. Wolpe,* 240 Cal.App.2d 874, 879-880 (1966).

The leading recent case analyzing the right to recover punitive damages on a fraud theory is *Common-*

wealth Mortgage Assurance Company v. Superior Court, 211 Cal.App.3d 508 (1989). In this case, the trial court granted summary adjudication of the issue of punitive damages, finding that the plaintiff had no right to recover such damages. 211 Cal.App.3d at 517. The Court of Appeal disagreed with the reasoning of the trial court, but upheld its ruling, finding the plaintiff's common law fraud theory inadequate. 211 Cal.App.3d at 517. The court noted that, "[i]f no cause of action for fraud has been stated, there is nothing to which punitive damages can attach." 211 Cal.App.3d at 518.

The Court of Appeal in *Commonwealth Mortgage* analyzed the factual allegations madde by the plaintiff, and found that necessary elements of a fraud cause of action, including justifiable reliance and damage, were lacking. 211 Cal.App.3d at 518-521. Thus, the court concluded, "[a]s the pleading fails to state a cause of action for fraud, there is nothing to which a claim for punitive damages can attach," and "the trial court properly granted summary adjunication of the issue that CMAC [the plaintiff] could not recover punitive damages." 211 Cal.App.3d at 521.

In light of the *Commonwealth Mortgage* case, it was manifest error for the trial judge to submit the claim for punitive damages on a fraud theory to the jury. Since the plaintiff abandoned his purpoported cause of action for fraud even before the trial began, there was no legal ground for awarding punitive damages for "fraud." Moreover, there was no evidence of "fraud", even if the issue had been properly before the court.

In light of the above authorities, the half million dollars award of punitive damages based on a finding of "fraud" is contrary to California Law. The award must be

stricken. If, however, the award were deemed to comport with California Law, it would represent a violation of the Constitution of the United States of America. *Pacific Mutual Life Insurance Company v. Haslip*,__ U.S. __ 111 S. Ct. 1032 (1991). The constitutional guarntee of due process of law imposes some limits on awards of punitive damages in state court. If a jury may award punitive damages on the basis of a legal theory not even presented to it, then there are no constitutional safeguards at all, and the award violates the federal constitution, as well as all civilized concepts of justice and equity.

The Standard Fire Insurance Company was never given the opportunity to defend itself against any claim of "fraud," since no claim was made at trial. Even the word "fraud" came into the case only when the court instructed the jury with respect to the question of awarding punitive damages.

The award of the policy benefit to Mr. Burnaby is wrong. The award of extracontractual compensatory damages is even more offensive. The half million award of punitive damages is, simply, an outrage.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on November 24, 1993, I served the within *Appendix To Petition for Writ of Certiorari, Volume I of II (Appendix A to G)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and 40 Copies)

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(Attorney for Respondent Frank Burnaby)

Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 1993, at Los Angeles, California.

Betty J. Malloy
(Original Signed)

93-848

No._____

FILED
NOV 29 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II OF II (Appendix H To J)

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COPY

Supreme Court Case No: S033800 Second Civil No. B047665

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANK BURNABY,

Plaintiff and Respondent,

v.

STANDARD FIRE INSURANCE COMPANY,

Defendant, Appellant, and Petitioner.

Review Sought of the Decision Rendered
by the Court of Appeal of the State of California,
Second Appellate District, Division One

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LOS ANGELES

PETITION FOR REVIEW

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APPENDIX H

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANK BURNABY,

Plaintiff and Respondent,

v.

STANDARD FIRE INSURANCE COMPANY,

Defendant, Appellant, and Petitioner.

PETITION FOR REVIEW

INTRODUCTION AND STATEMENT OF ISSUES

To the Honorable Malcolm M. Lucas, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Something is wrong with first party insurance bad faith law, if an insurer can be held liable for policy benefits and massive extracontractual damages for denying a claim based on information from the insured himself. Something is wrong with the civil jury trial system, if an expert witness is permitted to instruct the jury on the law, and if a jury is permitted to award punitive damages based on a finding of "fraud," where no such claim has been pleaded or proved. Something is wrong with the whole legal system, if a person may maintain two separate lawsuits seeking recovery for the same loss, based on different versions of the same facts, and recover twice for that loss against

different defendants. Yet, in a published opinion, a Court of Appeal panel has placed a stamp of approval on all of these things. The opinion will, unless this court intervenes, spawn endless litigation, drive up insurance rates, and encourage false and fraudulent claims.

Plaintiff Frank Burnaby has long been, and is now, the owner of a single family residence located in the Big Rock Mesa area of Los Angeles County. Unlike most residents of the prosperous area, Mr. Burnaby had no insurance at the time that he first learned of the Big Rock Mesa landslide in the fall of 1983. Nonetheless, he filed claims against the County and other governmental entities, whose conduct caused the landslide, he claimed, made the Burnaby residence a $1.1 million loss. These claims were successfully pursued. He also proceeded to buy a new policy of homeowner's insurance from Standard Fire Insurance Company, the policy that is the subject of this litigation. Standard denied the Burnaby claim, on the ground that the plaintiff concealed material facts when he bought his policy, and on the additional ground that the date of loss of the Burnaby residence was prior to the inception of Standard's contract of insurance. Undaunted, Mr. Burnaby sued Standard, and prevailed at trial. He has recovered the amount of money claimed to be due under Standard's policy, substantial extracontractual compensatory damages, and punitive damages in the amount of half a million dollars.

In a reported opinion with ominous implications, the Court of Appeal has upheld the unjust judgment of the trial court. In seeking review of the opinion of the Court of Appeal, defendant Standard Fire Insurance Company presents the following issues of law:

1. In an action by the owner of a house for landslide damage against his homeowner's insurer, where the plaintiff has stated in writing and then in testimony under oath that the landslide damage occurred before the inception of the defendant insurer's policy, and where the plaintiff has successfully pursued another lawsuit based on this evidence, is the plaintiff estopped to deny that the landslide damage actually happened before the defendant's insurance policy was in effect?

2. Is it reversible error to permit a purported insurance expert to testify as to the requirements of the law, where the witness erroneously states, among other things, that an insurer may not properly deny a claim even where the great weight of the evidence presented to the insurer supports denial?

3. Is it reasonable as a matter of law, so as to immunize an insurer from extracontractual liability, for the insurer to deny a homeowner's claim for landslide damage based on statements from the homeowner himself indicating that the damage predated the insurer's policy?

4. Where an insurer is required to pay its insured for landslide damage to the insured's house, is the insurer entitled to a credit in the amount that the insured has

already been compensated by third parties for the same loss?

5. Is it erroneous and unconstitutional to interpret *Civil Code* section 3294(c)(3) so as to permit an award of punitive damages for "fraud," where no fraud claim has ever been pleaded or proved?

All of these questions should be answered "yes." They present important issues of law of statewide, perhaps national, importance. Some of these issues are already pending before this court.[1]

STATEMENT OF FACTS

Much of the evidence concerning Mr. Burnaby's alleged loss and the handling of his claim by Standard is in conflict. Nevertheless, the facts necessary to frame the issues set forth above are relatively simple and straightforward and, for the most part, undisputed.[2]

---

[1] The issue of judicial estoppel is involved in *Montrose Chemical Corporation v. Admiral Insurance Company*, case number S026013, and in *Stonewall Insurance Company v. City of Palos Verdes Estates*, case number S027319. Issues involving the interpretation and application of the punitive damages statute are found in a variety of pending cases, including *Gourley v. State Farm Mutual Insurance Company*, case number S014133, *Wollersheim v. Church of Scientology*, case number S011790, *MGW, Inc. v. Fredericks Development Corporation*, case number S015966, and *Hilgedick v. Koehring Finance Corporation*, case number S017796.

[2] The record consists of a 20 volume clerk's transcript with 7,632 pages and a 16 volume reporter's transcript with 4,044 pages. This 11,676 page record was generated before and during a very long trial, which commenced on August 14, 1989, and ended on Halloween,

(continued...)

1. Mr. Burnaby, His House, and the Big Rock Mesa Landslide.

Mr. Frank Burnaby is a businessman, who works as a landscape lighting designer. He attended college, and now is the owner of his own business. [3 R.T. 2.] He is the owner of a single family residence located at 20743 Rock Point Way, Malibu, a ranch style home with three bedrooms and two bathrooms. It was built in the early 1960's, and was purchased by Mr. Burnaby in October of 1979. [3 R.T. 3.] Although he has owned the house on Rock Point Way continuously since 1979, Mr. Burnaby moved out in June of 1982, due to financial problems. He found that he could save money by renting the house and living in an apartment. [3 R.T. 8.] He was subsequently told that he could not renew his homeowner's policy with Standard unless he lived in the house. [3 R.T. 8.] He believed that homeowner's insurance was unavailable at any price if he did not live in the insured house. [3 R.T. 43.]

At the time that he moved out of his house, Mr. Burnaby had homeowner's insurance with Standard, which had a policy period of November 28, 1981, to November 28, 1982. [9 C.T. 3264-3283.] Mr. Burnaby was able to move back into his house in June of 1983. [3 R.T. 10.] However, he did not buy homeowner's insurance at that

---

[2](...continued)
October 31, 1989. Much of the record relates to matters outside the scope of this petition. The abbreviation "C.T." refers to the clerk's transcript, while "R.T." designates the reporter's transcript. Volume numbers precede these abbreviations, and page numbers follow them. Due to the page limitation established by rule 28(e)(6) of the *Rules of Court*, the statement of facts contained in this petition is relatively short, but a more detailed one may be found in the appellant's opening brief.

time. In fact, his house remained uninsured until several months after Mr. Burnaby attended a public meeting concerning the Big Rock Mesa landslide that was held on September 19, 1983. [9 C.T. 3287; 3 R.T. 10-16.]

Unfortunately, the Big Rock Mesa area of Malibu has experienced massive landsliding. In the fall of 1983, the County of Los Angeles informed local homeowners that an incipient landslide might be developing on the Mesa. Among the various possible causes of the landslide were highway construction in the 1930's, improper development, failure of a local homeowner's organization to maintain drainage and pumping systems, and the failure of certain homeowners to maintain their septic tank systems properly.[3]

The Burnaby residence was inspected by a geologist retained by Standard, who submitted a detailed report dated October 23, 1984. [10 C.T. 3621-3634.] It was noted that the house still appeared to be "structurally sound." [10 C.T. 3627-3628.] The same geologist inspected the Burnaby residence a second time on May 31, 1985. [10 C.T. 3745-3750.] The inspection revealed that the property was "in much the same condition" as it had been the year before. [10 C.T. 3746.] The report concluded that "[t]he residence is habitable and does not appear to be in imminent danger." [10 C.T. 3747.] It was also noted that Mr. Burnaby was very lucky in that his house was located over bedrock tilted to the north, a favorable local condition. [10 C.T. 3746.]

---

[3] The facts stated in this paragraph are derived from this court's opinion in *State Farm & Casualty Company v. Von Der Lieth*, 54 Cal.3d 1123, 1126-1129 (1991). Many of the same facts appear in the record of the present litigation, particularly in documentary evidence and in the testimony of expert witnesses.

2. The Differing Dates of Loss Claimed by Mr. Burnaby.

The key factual question in the handling of the Burnaby claim was the determination of the correct date of loss. Mr. Burnaby had insurance with Standard from November 28, 1981, to November 28, 1982. Then came the gap in coverage, during which Mr. Burnaby was uninsured, from November 28, 1982, to December 20, 1983, a period of more than a year. [8 C.T. 2891; 9 C.T. 3265.] The second Standard insurance contract had a policy period of December 20, 1983, to December 20, 1984. [8 C.T. 2891-2915.]

At different times, Mr. Burnaby claimed different dates of loss. To establish insurance coverage, he needed a date of loss when insurance was in effect. To pursue governmental entities without risking the bar of the statute of limitations, the date of loss would have to fall during the time of the coverage gap.

In his operative second amended complaint, without any embarrassment or explanation, Mr. Burnaby claimed that he was entitled to coverage under both of his Standard policies.[4]

In the wake of the meeting of September 19, 1983, Mr. Burnaby filed claims against the County of Los Angeles and various other governmental entities, copies of which were received in evidence at trial. [8 C.T. 2880-

---

[4] There can be only one date of loss in first party claims such as that of Mr. Burnaby. *Prudential-LMI Commercial Insurance Company v. Superior Court,* 51 Cal.3d 674 (1990). Thus, the effort to place the date of loss during two separate time periods represented a legal impossibility.

2883; 9 C.T. 3116-3127.] In his claim against the County, which was dated December 16, 1983, and filed on December 19, 1983, Mr. Burnaby alleged that his house on Rock Point Way had been damaged in the amount of $1.1 million. He stated that the damage "commenced on or about September 19, 1983, is continuing to this date, and appears to be continuing into the foreseeable future." [8 C.T. 2880.] The letter listed some 18 separate acts and omissions chargeable to the County, which were claimed to have caused the landslide. [8 C.T. 2881-2882.] Claims similar to the claim against the County were filed on December 19, 1983, against the Flood Control District [9 C.T. 3116-3119], against the State of California [9 C.T. 3120-3123], and against the Coastal Commission. [9 C.T. 3124-3126.]

In his testimony at trial, Mr. Burnaby admitted that he had signed the governmental claims. He stated that they had been drafted by a neighbor, Mr. Ralph Saltzman, who was a lawyer, and represented the only way for Big Rock residents to protect themselves. He submitted the claims because he was concerned about expansion of the landslide. [3 R.T. 18-20.] He wanted to be "officially registered" as being in the Big Rock landslide. [3 R.T. 70.] Mr. Burnaby was told by Mr. Saltzman that the claims had to be submitted within 100 days of the meeting of September 19, 1983. [3 R.T. 71.] He signed the claims on December 19, 1983. [3 R.T. 126.] He thought that the cracks he had observed at his house "could have been related to [the] landslide." [3 R.T. 144.]

Mr. Burnaby admitted that he never withdrew any of his governmental claims. [3 R.T. 159.] In fact, he followed them up with a lawsuit. On June 15, 1984, Mr. Burnaby and various other homeowners filed a complaint

for damages against the County of Los Angeles and other governmental entities, entitled *Baker v. County of Los Angeles,* Los Angeles Superior Court case number WEC 87767. [10 C.T. 3685-3731.] The complaint contained allegations similar to those found in the governmental claims cited above.

As required by his insurance policies with Standard, Mr. Burnaby submitted to three separate statements under oath. His versions of the facts relating to the appropriate date of loss were not consistent. In contrast to his statements to governmental authorities, in which he needed to place the date of loss during the coverage gap, in his statements under oath and in his trial testimony, Mr. Burnaby tried to place the proper date of loss between November 28, 1981, and November 28, 1982, or at a time between December 20, 1983. and December 20, 1984.

The first statement under oath given by Mr. Burnaby was taken by attorney Jay Robinson on May 3, 1985. The entire transcript was admitted into evidence [8 C.T. 2916-2970], as were the transcripts of the later statements under oath. [8-9 C.T. 2971-9 C.T. 3115.]

In his first statement under oath, Mr. Burnaby said that, after the public meeting of September 19, 1983, he became "more aware" of his property. He began to notice cracks in a variety of places. [8 C.T. 2945.]

He also said that the cracks in his driveway were the last to appear, and that they occurred in 1984. [8 C.T. 2949.]

A second statement under oath was taken on June 9, 1987, after Mr. Burnaby had made a claim under his first Standard homeowner's policy, the one in effect from

November 28, 1981, to November 28, 1982. [8 C.T. 2971-2994.] He specifically corrected his prior statement under oath, that had been taken two years earlier, saying that he first noticed serious cracks in his driveway in 1980, rather than in 1984. [8 C.T. 2982.] He had refreshed his recollection by referring to two proposed contracts for roadway and driveway work. [8 C.T. 2983, 2993-2994.] One proposal had a price tag of $2,865.00 [8 C.T. 2993], covering repair on the Burnaby property, while the other was for work on an adjacent roadway, at a cost of $16,945.00. [8 C.T. 2994.]

The statement under oath of June 9, 1987, had to be adjourned after only a few pages of testimony, because Mr. Burnaby had failed to produce certain promised records. [8 C.T. 2986-2988.]

The third and final statement under oath was taken on November 11, 1987. [8 C.T. 2995-9 C.T. 3115.] Mr. Burnaby testified that, in 1980, he had driveway repair work done pursuant to the smaller of the two estimates that he had previously identified. [8 C.T. 2993; 9 C.T. 3050.] Additional problems then came up in late 1981, apparently during the policy period of the first Standard homeowner's insurance policy. [9 C.T. 3070.] He suspected at that time that tree roots were the problem. [9 C.T. 3070.] He was very upset, because he had spent about $3,000.00 a year and a half earlier, but now, he said, "I had my driveway cracking up again." [9 C.T. 3077.] He said that the driveway "continued to deteriorate" thereafter. [9 C.T. 3081.]

During his last statement under oath, Mr. Burnaby testified that his house was flooded in 1980, due to a broken pipe. The flood caused all of the carpets to be destroyed, and the repair cost was in the area of $8,000.00.

The carpets had to be taken up, and he noticed a crack across the dining room. [9 C.T. 3089-3091.] He said that it was some ten to twenty feet long. [9 C.T. 3092.][5]

At the third statement under oath, Mr. Burnaby produced a chronology of events which he had prepared. The chronology referred to the 1980 flood. It also referred to a "complete redo" of Mr. Burnaby's patio, at considerable expense, which was necessitated by the fact that the patio was "cracked with extreme unleveling." [9 C.T. 3113.] The redo of the patio occurred in October of 1983. [9 C.T. 3113.]

After his third and final statement under oath, but before trial, Mr. Burnaby lost interest in fixing a date of loss in late 1981 or in 1982. On May 23, 1989, the court granted Standard's motion for summary adjudication of issues, in part. [4 C.T. 1313-1316.] In particular, the court determined that any claim by Mr. Burnaby for property damage under the Standard policy in effect from November 28, 1981, to November 28, 1982, was time barred by the applicable one year contractual statute of limitations, and

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[5] This testimony about the 1980 flood was directly contrary to what Mr. Burnaby told Standard's geologist. [10 C.T. 3621-3634.] Interestingly, the information given to the geologist, that there had been no crack when carpets were taken up two years earlier was conveyed at a time that Mr. Burnaby was trying to fit his loss within a policy period extending from December 20, 1983, to December 20, 1984. Thus, it was then in his interests to claim that the crack in the slab was of recent vintage, while later he sought to have the landslide damage occur continuously, beginning prior to the inception of the policy that took effect on November 28, 1981.

that no coverage existed under that policy as a matter of law. [4 C.T. 1466-1468.][6]

At the trial of the present action, a case entirely separate from the lawsuit against the County of Los Angeles and other governmental entities, and with the possibility of coverage under the policy in effect in 1981 and 1982 eliminated, it was in Mr. Burnaby's interest to change his version of the facts from what he had stated earlier. In his opening statement to the jury, Mr. Burnaby's trial attorney revealed that some of his client's answers at the various statements under oath were "just plain wrong." [1 R.T. A266.] The answers were certainly different from Mr. Burnaby's trial testimony, which supported a date of loss in the spring of 1984. [3 R.T. 107-108.] He stated that his testimony at the third statement under oath was simply incorrect. [3 R.T. 113.]

3. The Defendant's Denial of the Burnaby Claim.

Mr. Burnaby's claim was denied in a letter dated August 7, 1985 from Mr. Jay Robinson, Standard's coverage attorney, to one of the attorneys representing Mr. Burnaby. [10 C.T. 3751-3753.] The denial was based on two essential grounds, concealment by Mr. Burnaby of information at the time that he applied for his insurance policy that took effect on December 20, 1983, and the fact that the appropriate date of loss fell during the time of the coverage gap, prior to December 20, 1983.

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[6] This ruling, with respect to the one year contractual statute of limitations, was clearly correct. *Lawrence v. Western Mutual Insurance Company,* 204 Cal.App.3d 565 (1988).

Although there was a serious conflict in the evidence concerning what Mr. Burnaby told his insurance agent at the time that he purchased the policy that took effect on December 20, 1983, Mr. Burnaby admitted at trial that he never told the agent about the governmental claims that he had filed. [3 R.T. 40.]

4. The Pleadings in the Present Case.

Mr. Burnaby filed his original complaint on September 1, 1984, but never served it. [1 C.T. 1-36.] A first amended complaint [1 C.T. 37-103], was met with a successful demurrer [1 C.T. 126-167], and, subsequently, the operative second amended complaint was filed. [1 C.T. 175-246.]

Mr. Burnaby sought recovery against Standard Fire Insurance Company, as of the time of commencement of trial, on three causes of action: breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. [5 C.T. 1803.] During the course of trial, the court reinstated a cause of action based on alleged violation of *Insurance Code* section 790.03. [8 R.T. 1346.]

In its answer to the second amended complaint, defendant Standard Fire Insurance Company denied all of its material allegations, and asserted various affirmative defenses. [2 C.T. 713-720.]

Although much of the trial was devoted to an attempt to fix Mr. Burnaby's date of loss, there was also a lot of evidence concerning the defendant's alleged "bad faith," including expert testimony.

5. The Testimony of the Plaintiff's Insurance Expert.

The plaintiff's claim that he was entitled to extracontractual damages was based primarily on the testimony of one Richard Leabow, a purported insurance expert. [3 R.T. 209- 5 R.T. 769.] Mr. Leabow was born in 1930, and had a long, but unsuccessful, career as an insurance agent. [4 R.T. 480, 5 R.T. 722.] In fact, he was terminated by 32 of the 47 insurance companies that appointed him. [5 R.T. 722.] At the time of trial, Mr. Leabow was a professional witness, doing consulting work for attorneys, mainly plaintiff's attorneys. [3 R.T. 210.] He had previously testified 14 times in court, always for the plaintiff. [4 R.T. 414.] He charged $1,300.00 a day to testify in court. In all cases in litigation in which he had been consulted, he had found "bad faith" on the part of the insurer involved in the case. [4 R.T. 416.] Although the witness still did a little bit of consultation with respect to the purchase of insurance, his main work as of the time of trial was to be an expert for plaintiff's lawyers who had cases in litigation. [4 R.T. 418-419.]

Mr. Leabow has a bachelor's degree from U.C.L.A. with an insurance minor. [3 R.T. 211.] He is a Chartered Property Casualty Underwriter (C.P.C.U.) [3 R.T. 213], and has worked as an insurance agent. [3 R.T. 217-218.]

At one point, the trial judge said "I don't see that he has much, if any, experience on claims handling practices" [3 R.T. 260], but ruled that he could testify about previous qualifications as an expert witness in the area. [3 R.T. 264.] In every single case where he had been retained to offer an opinion concerning possible violation of *Insurance Code* section 790.03, he found that there was such a violation.

[11 R.T. 2407-2408.] He estimated that there had been about 75 cases in which he has been asked his opinion on this subject. [11 R.T. 2407-2408.] He admitted, nonetheless, that he had never made a decision to pay or to deny an insurance claim. [4 R.T. 480.]

Over objection, Mr. Leabow was allowed to express the opinion that it was improper to deny Mr. Burnaby's claim based on nondisclosure of the cracks on his property. [3 R.T. 252-253.] Over objection, he said that it was the defendant's duty to find some basis for coverage, and that any other approach is a mischaracterization of the evidence to the detriment of the insured, constituting a violation of the covenant of good faith and fair dealing. [3 R.T. 300.]

Over objection, Mr. Leabow was allowed to testify that there is a difference between a mere breach of contract and "bad faith," and that there is a duty of "utmost good faith," which is presumably higher than the duty to perform under a contract. [4 R.T. 320.] Over objection, he was permitted to testify about the Unfair Practices Act, and the reasons for it, and to express the opinion that the defendant violated it. [4 R.T. 329-332.]

Mr. Leabow stated that "to characterize him [Mr. Burnaby] as having made a 1.1 million dollars (sic) claim for earth movement damage to his property is simply to mischaracterize the evidence." [4 R.T. 472.] Over objection, he expressed the opinion that it was perfectly proper for Mr. Burnaby to apply for insurance after signing the claim letters. [4 R.T. 352-353.]

Mr. Leabow, over objection, was allowed to express the opinion that Mr. Robinson's letter denying the Burnaby claim contained misrepresentations. [11 R.T. 2389.] This opinion was based on the fact that there was a note in the

claim file contrary to what was said in the letter. [11 R.T. 2389.] Mr. Leabow admitted that it is a common practice to have insurance agents sign applications for insurance after securing the necessary information over the phone. [4 R.T. 508.]

The most interesting, and bizarre, testimony of Mr. Leabow dealt with the duty of an insurer to pay a claim. Mr. Leabow stated that an insurer may not properly deny a claim, even if the preponderance of evidence supports a finding of lack of coverage. Rather, a denial is proper only if the evidence supporting lack of coverage is "overwhelming." Otherwise, the insurer must "lean in favor of the insured." [5 R.T. 682.] In quantitative terms, a claim should be paid even if 80% of the evidence supports its denial. [5 R.T. 690.] An insurer has the duty, in Mr. Leabow's opinion, to pay a claim if there is any basis for finding the loss to be in the policy period. It is "bad faith" to look for evidence that the claim might be outside the policy period, in Mr. Leabow's view, even if that evidence ultimately proves to be correct. [4 R.T. 540.]

6. The Verdict, the Finding of "Fraud," and the Award of Punitive Damages.

The plaintiff's operative second amended complaint originally included a cause of action for alleged fraud in the sale of Mr. Burnaby's last Standard insurance policy, but this cause of action was voluntarily dropped before trial. [5 C.T. 1803.] Nonetheless, after the initial special verdict in favor of the plaintiff [7 C.T. 2647-2651], the court still submitted the issue of punitive damages to the jury with standard instructions from the *Book of Approved Jury Instructions (BAJI)*. [8 C.T. 2725-2731.] The court had

previously overruled an objection made by the defendant's attorney to the effect that the jury should not be instructed on fraud, because there was no cause of action for fraud in the case. [16 R.T. 3413.]

The jury found that the defendant was not guilty of malice or oppression, but found it guilty of "fraud." [8 C.T. 2737.] The amount of punitive damages was fixed at $500,000.00. [8 C.T. 2737.]

7. The Entry of Judgment, the Denial of Subrogation Rights, and the Appeal.

At the beginning of trial, the court ruled that it would reserve until the conclusion of trial the question of defendant's subrogation rights, if any. [1 R.T. . .0-A32.] After the verdicts of the jury, and the entry of judgment on them, the defendant filed a motion to amend the judgment to provide for the defendant's right of subrogation.

The court denied the motion to amend the judgment, reasoning that the defendant's subrogation rights were forfeited, because the jury found the defendant guilty of breach of contract as well as conduct permitting the award of extracontractual damages. [8 C.T. 2746.]

In connection with Standard's motion for a new trial, the plaintiff consented to a reduction in the amount of extracontractual compensatory damages from $600,000.00 to $200,000.00. [8 C.T. 2747-2749.] In accordance with the jury's verdicts, and the plaintiff's consent to a reduction in damages, judgment was entered. [8 C.T. 2750-2752.] From the judgment and from the order denying subrogation rights, the defendant timely appealed. [8 C.T. 2753-2755.]

8. The Request for Judicial Notice.

During the course of the appeal, the defendant Standard Fire Insurance Company filed in the Court of Appeal a request for judicial notice of court documents pertaining to *Baker v. County of Los Angeles,* the case brought by Mr. Burnaby and others for landslide damage to their houses, as noted above.

These documents show that Mr. Burnaby and other Big Rock homeowners received some $97 million in settlements, although no public record could be found of the precise amount received by Mr. Burnaby individually. Although there was no formal order concerning the request for judicial notice, the Court of Appeal implicitly granted the request, by citing certain facts not found elsewhere in the record.

9. The Opinion of the Court of Appeal.

On June 1, 1993, the Court of Appeal filed its opinion, certified for publication, affirming the judgment of the trial court in its entirety. A copy of the slip opinion is attached hereto as exhibit A.

On June 16, 1993, the defendant filed a petition for rehearing, pointing out some of the serious flaws in the Court of Appeal opinion. Nine specific factual misstatements were noted, along with even more serious omissions.[7] The failure of the court to consider important legal issues was also mentioned.

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[7] Some of the more serious factual misstatements and omissions on the part of the Court of Appeal will be discussed below, in the portion of this petition devoted to legal argument.

In response to the petition for rehearing, the plaintiff filed a brief entitled "request for minor modifications to court's opinion and opposition to petition to rehearing." The plaintiff was apparently worried about some of the errors made by the Court of Appeal, and believed that they could be corrected.

On June 30, 1993, as noted in exhibits B and C to this petition, the Court of Appeal denied both the defendant's petition for rehearing and the plaintiff's request for modification of its opinion.

10. The Urgent Need for Review.

Review should be granted in order to provide guidance to the insurance industry in the area of claims handling, and to the lower courts in the area of adjudicating insurance disputes. The history of the present lawsuit shows that the legal duties of insurers are not clearly defined. Moreover, to the extent that those duties were defined for the trier of fact, the task was accomplished mainly by an expert witness who was not even a lawyer.

A second reason for granting review is to correct a million dollar mistake by a jury, representing a substantial injustice to the defendant. The plaintiff was permitted to advance several inconsistent versions of the facts, and achieve double recovery for his claimed loss. The law should not permit him to do so, and the contractual and equitable subrogation rights of the defendant should be recognized. It is manifestly improper to permit a half million dollar award of punitive damages on the basis of a "fraud" finding, when no claim of fraud was ever properly before the trier of fact.

The third reason why review is essential is to avoid the serious adverse effects that will ensue if the Court of Appeal decision remains published. Uninsured property owners would be encouraged to go and buy insurance even after they know about progressive property damage that they are suffering. Plaintiffs would be encouraged to take different factual positions in different lawsuits, because such conduct would be legally acceptable. The use of expert witnesses telling juries about the law would greatly expand. Double recovery would be encouraged. An entirely new type of punitive damages claim would develop, burdening the courts and punishing defendants for the mere denial of liability, all based on an erroneous interpretation of *Civil Code* section 3294(c)(3).

To do justice and to settle important issues of law, review by this court is essential.

ARGUMENT

I.

In Light of His Statements and Conduct, the Plaintiff Is Estopped to Claim a Date of Loss of His House Within the Effective Dates of the Defendant's Insurance Policy, and He Therefore Has No Coverage Under It.

The problem of determining the date of loss in cases of continuous and progressive property damage has beguiled property owners, insurers, and the courts. Mr. Burnaby's case is unusual in that a property owner has, in various statements and in two separate lawsuits, attempted to fix the date of loss during three separate time spans. As things now stand, he has been successful as to two of them. He should

be held to be estopped from claiming two different dates of loss, according to his interests in different cases.

In *Abari v. State Farm Fire & Casualty Company,* 205 Cal.App.3d 530 (1988), the Court of Appeal considered the question of accrual of a property damage claim under a homeowner's insurance policy for subsidence damage to a house. The trial court sustained the defendant insurer's demurrer without leave to amend, holding that, as a matter of law, the homeowner's observation of cracks inside his house and in his driveway was sufficient to put him on notice. The Court of Appeal affirmed, rejecting the argument, made for the first time on appeal, that the cracks may have been so small that no reasonable person would be put on notice of a subsidence problem. 205 Cal.App.3d at 535. The *Abari* court noted the general rule that a cause of action of the type before it accrues when the plaintiff discovers or should have discovered all facts essential to his cause of action. 205 Cal.App.3d at 535. Since the plaintiff in *Abari* failed to bring an action within a year of his discovery of the cracks in question, his claim against his homeowner's insurer was held time barred, under the one year contractual statute of limitations found in the insurance policy in question. 205 Cal.App.3d at 536.

Citing *Abari* and other authorities, this court, in *Prudential-LMI Commercial Insurance v. Superior Court,* 51 Cal.3d 674 (1990), ruled that, for purposes of determining coverage, the inception of a loss should be "determined by reference to reasonable discovery of the loss and not necessarily turn on the occurrence of the physical event causing the loss." 51 Cal.3d at 686. Specifically, the "inception of the loss" is "that point in time at which appreciable damage occurs so that a reasonable insured

would be put on notice of a potentially insured loss." 51 Cal.3d at 685.

Prudential-LMI involved damage to an apartment building caused by earth movement, which damage occurred over time, and was first manifested by an "extensive crack in the foundation and floor slab of the building." 51 Cal.3d at 680-681. The court defined the date of loss as noted above, and concluded that, in first party progressive property loss cases, "where the loss occurs over several policy periods, the date of manifestation determines coverage," and until there is manifestation, "the insured has not suffered a compensable loss." 51 Cal.3d at 699. Once the loss is manifested, however, there is no longer a contingent risk, and insurers whose policy periods commence after the initial manifestation of the loss are not responsible for any potential claim relating to the "previously discovered and manifested loss." 51 Cal.3d at 699.

The court in *Prudential-LMI,* in defining the date of loss as "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered," stated that "the insured is required to be diligent in the face of discovered facts." 51 Cal.3d at 687. Moreover, "[t]he more substantial or unusual the nature of the damage discovered by the insured (e.g., the greater its deviation from what a reasonable person would consider normal wear and tear), the greater the insured's duty to notify his insurer of the loss promptly and diligently." 51 Cal.3d at 687.

Government Code section 911.2 provides that "[a] claim relating to a cause of action for death or for injury to person or to property . . . shall be presented . . . not later

than six months after the accrual of the cause of action." *Government Code* section 910 has detailed requirements specifying the contents of a claim, including a description of the damage or loss incurred so far as it may be known at the time of presentation of the claim.

In 1983, *Government Code* section 911.2 allowed only 100 days from the accrual of a cause of action to file a claim. When Mr. Burnaby filed his claim on December 19, 1983, asserting a date of loss of September 19, 1983, he complied with this statute. As the Court of Appeal noted in its opinion, Mr. Burnaby and other homeowners successfully prosecuted their lawsuit against the County of Los Angeles and other governmental entities, relying on the integrity of the September 19, 1983 date of loss claimed by Mr. Burnaby and others.

It is improper for Mr. Burnaby to contend that his house was lost on one date, for purposes of pursuing a claim against the County of Los Angeles, while claiming a different date for insurance coverage purposes. Although a plaintiff may plead inconsistent theories of recovery, he may not "blow hot and cold" as to the facts, particularly those facts which are within his knowledge and are positively stated. *Manti v. Gunari,* 5 Cal.App.3d 442, 449-450 (1970); *Drake v. Morris Plan Company,* 53 Cal.App.3d 208, 210-211 (1975); *Tovar v. Southern California Edison Company,* 201 Cal.App.3d 606, 613 (1988).

In *Gray v. Reeves,* 76 Cal.App.3d 567 (1977), the Court of Appeal reviewed a summary judgment in a medical malpractice action in favor of the defendants, that was based on the statute of limitations and a factual showing derived from the plaintiff's own deposition testimony. When the defendants moved for summary judgment, the

plaintiff opposed the motion with a declaration retracting his deposition testimony, thereby creating a triable issue of fact, according to the plaintiff. Nonetheless, the trial court granted that summary judgment, disregarding the attempt to retract sworn testimony, and the Court of Appeal affirmed. The court reasoned that "the credibility of the admissions" of the plaintiff is "so highly regarded that contradicting affidavits may be disregarded as irrelevant, inadmissible or evasive." 76 Cal.App.3d at 573. The same rule has been stated in various other cases, including *Leasman v. Beech Aircraft Corporation,* 48 Cal.App.3d 376 (1975), *Nunez v. R'Bibo,* 211 Cal.App.3d 559 (1989), and *Sandoval v. Mercury Insurance Group,* 229 Cal.App.3d 1 (1991).

Unlike the plaintiff in the *Gray* case, who was held to be estopped to change his deposition testimony, the Court of Appeal here allowed Mr. Burnaby to get away with inconsistent positions at different times in different lawsuits. It does not even mention the *Gray* decision, although it was cited in the appellant's opening brief. In fact, the whole question of estoppel is dismissed by the Court of Appeal by the comment that "Burnaby presented a reasonable and plausible explanation to the jury" for his varying versions of the truth. (Opinion, page 11.)

In *Aerojet-General Corporation v. Superior Court,* 211 Cal.App.3d 216 (1989), the Court of Appeal considered a petition for rehearing, in which the losing parties appeared to shift their position. Rehearing was denied, the court stating that "[o]ne may not alter one's appellate argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment." 211 Cal.App.3d at 240.

Perhaps the most thorough analysis of estoppel in the present context can be found in the comment entitled

"Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel" 80 Nw. U.L. Rev. 1244 (1986), by Rand C. Boyers. According to Mr. Boyers, "the doctrine of judicial estoppel prevents a party asserting a position in a legal proceeding that is contrary to a position previously taken by him in the same or some earlier legal proceeding." (Footnotes omitted.) 80 Nw. U.L. Rev. 1244.

A prototypical example of judicial estoppel, analyzed by Mr. Boyers in his comment, can be found in the case of *Finley v. Kesling,* 105 Ill.App.3d 1, 433 N.E.2d 1112 (1982). The plaintiff in the case, Mr. Charles O. Finley, the owner of the Oakland Athletics baseball team at the time, had testified in a 1974 Indiana divorce action, under oath, that he owned 31% of the stock of his corporation, while his wife owned 29%, and his children 40%. The Indiana court accepted this testimony, and therefore did not include the 40% share of the children in dividing the property of Mr. Finley and his wife. Later, in an Illinois lawsuit, Mr. Finley asserted that he was actually the beneficial owner of the stock he had previously testified belonged to his children. The Illinois courts held that Mr. Finley was estopped to so contend, having given contrary testimony in the earlier domestic litigation. 105 Ill.App.3d at 10, 433 N.E.2d at 1119.

It is respectfully submitted that the same rule of law that was applied to Mr. Charles O. Finley should be applied to Mr. Frank Burnaby. The present plaintiff should not be permitted to sue, successfully the County of Los Angeles and other governmental entities in an action where the validity of his claim depended on a September 19, 1983 date of loss of his property, and still maintain the present lawsuit, based on the contention that the true date of loss

was during the spring of 1984. Although the *Northwestern Law Review* comment by Mr. Boyers does not cite any California cases, the principles discussed appear to be the same as those long followed by California courts. Although the Court of Appeal in *Gray v. Reeves,* 76 Cal.App.3d 567 (1977), did not expressly rely on estoppel, it did so by implication. The *Gray* court held that a plaintiff could not, as a matter of law, change deposition testimony in order to avoid the statute of limitations. The plaintiff in the present case, in contrast, has been permitted, thus far at least, to change his testimony with respect to the date of loss of his house, so as to bring it within the policy period of an insurance policy that he bought after he was already aware of the Big Rock Mesa landslide.

In his response to the petition for rehearing in this case, Mr. Burnaby actually proposed that the Court of Appeal opinion be modified so as to indicate that he "had been advised to file a claim as soon as the landslide was announced, to avoid any possibility of a statute of limitations bar to a later suit for damages." (Page 7.) He apparently believes, even now, that there is nothing wrong with claiming different facts, according to one's interests. The courts, however, view truth as unitary, not something to be changed when convenient.

If Mr. Burnaby is held to the date of loss stated in his governmental claims, and in his lawsuit against governmental entities, he will have no coverage. If Mr. Burnaby has no coverage under the Standard policy that took effect on December 20, 1983, he has no right to extracontractual general damages or to punitive damages. *Abari v. State Farm Fire & Casualty Company,* 205 Cal.App.3d 530, 536 (1988). Thus, a decision by this court that Mr. Burnaby is

bound by the facts stated by him under oath and in his governmental claims would be sufficient to resolve the entire litigation, mandating entry of judgment in favor of the defendant.

The jury in the present case was told that it is all right to tamper with the truth, as long as the result is finding coverage. The person who so instructed the jury was Mr. Richard Leabow, a purported expert witness, whose testimony recasts the law to the benefit of the plaintiff.

II.

No Expert Witness May Properly Instruct a Jury About the Law or, Even Worse, Do So Erroneously, and the Trial Court Erred Prejudicially in Allowing Such Testimony.

The testimony of Mr. Richard Leabow, only the highlights of which are cited in this petition, was incredible. In the guise of expert testimony, Mr. Leabow instructed the jury on the law, both substantive law and how to determine the facts. In spite of objections, Mr. Leabow rambled on and on, discussing numerous subjects. His area of expertise, if any, was never specifically defined.

The law places limits on the permissible scope of expert testimony. Whether a person qualifies as an expert in a particular case depends on the facts of the case and the qualifications of the witness. The competency of the expert relates to the topics and fields of knowledge about which the person is asked to testify. In considering whether a person qualifies as an expert, the field of alleged expertise must be carefully distinguished and limited. *People v. Kelly,*

17 Cal.3d 24, 39 (1976). See also, *People v. Chavez,* 39 Cal.3d 823 (1985). If a purported expert witness offers testimony beyond the scope of his expertise, that testimony should be excluded. *Putensen v. Clay Adams, Inc.,* 12 Cal.App.3d 1062, 1080-1081 (1970); *Finn v. G.D. Searle & Company,* 35 Cal.3d 691, 703-704 (1984).

Assuming that Mr. Leabow was qualified to testify about something, he should never have been allowed to offer opinions on proper claims handling. He admitted that he had never been involved in the decision to pay or deny a claim. Only once before, in a reported California case, has an appellate court considered testimony similar to that offered by Mr. Leabow, although the court reached a conclusion very different from that of the Court of Appeal in the present case.

In *California Shoppers, Inc. v. Royal Globe Insurance Company,* 175 Cal.App.3d 1 (1985), the Court of Appeal reviewed a judgment that was entered in a "bad faith" case. The court found it erroneous to admit evidence of the type that was admitted in the present case. The court analyzed the testimony of one purported expert, as follows:

> "Attorney Wylie A. Aitkin was allowed to testify as a so-called expert on the subject of insurance company practices, the purpose of such testimony obviously having been designed to show that Royal Globe had not only breached the implied covenant of good faith and fair dealing, but had also gone further and behaved or failed to behave in such a way as to make it answerable in exemplary damages.

"In other words, Aitkin's testimony was essentially that everything Royal Globe did with reference to California Shoppers was wrong. He was permitted to refer to California Shoppers' exhibit 19 (not placed in evidence), a chart prepared by Mr. Hafif, one of the attorneys for California Shoppers, and represented to be 'statements of good insurance practices.' Over objections by defense counsel, the court permitted the chart to be used before the jury to `illustrate' Aitkin's testimony. The chart itself was highly prejudicial because it set forth selected excerpts of legal propositions in a misleading manner. *Aitkin's testimony contained some accurate statements of law, some incomplete statements of law, and some palpably erroneous statements of law. Whatever, almost all of this testimony was wholly incompetent.*

"The crux of the error here was that Aitkin in no sense was qualified as an expert to testify about the subject on which he purported to testify. There is no question both on the record and as a matter of repute at the bar, but that he is a highly qualified trial attorney, and a particularly aggressive advocate of plaintiffs' cases against insurance companies. However, no foundation whatsoever was laid to demonstrate that Aitkin had any special knowledge, skill, experience, training or education such as would qualify him as an expert on *insurance company*

> *practices.* It is no answer, that certain of his professional efforts are aimed at discovering insurance company derelictions of duty, and then taking them to task. An objection was made to his giving opinions on how California Shoppers' claim was handled.
>
> "Indeed, as Aitkin candidly admitted, he had never been employed nor even retained as counsel by an insurance company. Small wonder.
>
> "It is well settled that an expert's qualifications must be established with respect to the subject matter of his testimony. The fact that the purported expert may be qualified in one field vaguely related to another does not mean that he is qualified in that other field." (Emphasis added in part.) 175 Cal.App.3d at 66-67.

In contrast, the Court of Appeal in the present case upheld the admission of the testimony of Mr. Leabow, although he was certainly less qualified to offer legal opinions than attorney Wylie A. Aitkin. Although the *California Shoppers* case was prominently cited by the appellant in its opening brief, it was not even mentioned, much less distinguished, by the Court of Appeal in its cursory analysis of the admission, over objection, of Mr. Leabow's testimony.

The most disturbing aspect of Mr. Leabow's appearance on the witness stand was his discussion of the law. The trial court permitted, and the Court of Appeal has now approved the practice of allowing an expert to instruct a

jury on the requirements of the law, notwithstanding earlier contrary authority.

Up to now, the law has been that an expert witness may not interpret the law, provide an interpretation of a statute, or give opinions concerning legal questions that are within the province of the court. *Elder v. Pacific Telephone & Telegraph Company,* 66 Cal.App.3d 650, 664 (1977); *Communications Satellite Corporation v. Franchise Tax Board,* 156 Cal.App.3d 726, 747 (1984); *Sheldon Appel Company v. Albert & Oliker,* 47 Cal.3d 863, 884 (1989).

In *Downer v. Bramet,* 152 Cal.App.3d 837 (1984), the Court of Appeal reviewed a trial court ruling prohibiting an attorney expert witness from offering legal conclusions in the guise of expert testimony. The refusal of the trial court to allow such testimony was upheld, because "the calling of lawyers as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern day 'trial by oath' in which the side producing the greater number of lawyers able to opine in their favor wins." 152 Cal.App.3d at 842. Expert testimony should be "limited to those areas in which the subject is sufficiently beyond common experience that an expert opinion would assist the trier of fact." 152 Cal.App.3d at 842.

Unlike the proposed expert in *Downer*, Mr. Leabow was not even a lawyer. Nonetheless, he was permitted to testify as to the requirements of the law, and he did so erroneously. Although the jury was elsewhere instructed that factual issues should be decided by a preponderance of the evidence, a 50% plus standard of proof, Mr. Leabow erroneously told the jury that an insurance company, in

considering a contract claim, could not weigh the evidence by such a standard. This testimony, considered in the light of all the erroneous testimony concerning fiduciary obligations and statutory obligations, was highly misleading. The validity of all civil claims is measured by the preponderance of the evidence standard, and this basic rule of the legal system cannot be altered by the testimony of any purported expert. If a purported expert seeks to change the law, and provide standards of conduct different from those established by law, such expert testimony must be disregarded. *Day v. Rosenthal,* 170 Cal.App.3d 1125, 1147 (1985).

In upholding the propriety of Mr. Leabow's testimony, the Court of Appeal quotes only a small part of it. It appears to hold that, since the quoted testimony was elicited on cross examination, the defendant has no right to object to it on appeal. However, the law is well established that a party does not, by cross examining a witness, waive the right to challenge the testimony of that witness on appeal. *Moore v. Norwood,* 41 Cal.App.2d 359, 368-369 (1940); *People v. Sam,* 71 Cal.2d 194, 207 (1969).

When the time came to cross examine Mr. Leabow, the trial judge had already ruled in favor of his competency as an expert witness, and had overruled numerous objections. The defendant's attorney, therefore, had no choice but to find out the basis for Mr. Leabow's bizarre views, which he had already explained to the jury in great detail, telling the jury about both the law and the facts. Defendant never waived the right to challenge the legal propriety of Mr. Leabow's testimony, any more than the defendant did so in the *California Shoppers* case, which is discussed above. A witness such as Richard Leabow or Wylie Aitkin, having

never participated in the decision to pay or deny an insurance claim, should not be permitted to testify at all concerning insurance company practices.

Mr. Leabow's improper testimony undoubtedly influenced the jury's fact finding, as to all causes of action. The jury was told that an insurer must pay a claim, even where the great weight of the evidence supports its denial. From such an erroneous premise, it is easy to find that the defendant is guilty of not only breach of contract, but statutory violations, common law bad faith, and breach of fiduciary duty, whether or not any evidence of such liabilities exists. Based on the testimony of Mr. Leabow, the jury awarded extracontractual damages, but there was no evidence that supported any such award.

III.

An Award of Extracontractual Damages Against an Insurer for Denial of a Claim Cannot Stand Unless Reasonable Minds Cannot Disagree About a Finding That the Denial Was Unreasonable and Without Proper Cause, and No Such Finding Is Possible Where the Insurer Has Based Its Denial of a Claim on Information From the Insured Himself.

Although the Court of Appeal found the evidence sufficient to support the jury's findings concerning extracontractual liability in this case, it did not bother to consider any of the authorities cited by the defendant on the subject. In fact, it did not cite any authority whatsoever. Had it done so, the Court of Appeal would have been required to analyze different evidence, and it would have

found that the denial of Mr. Burnaby's claim was reasonable as a matter of law.

Extracontractual tort liability, with respect to first party insurance, was first recognized by this court in *Gruenberg v. Aetna Insurance Company,* 9 Cal.3d 566 (1973). Such liability may exist only where an insurer fails to deal fairly and in good faith with its insured, "by refusing, without proper cause, to compensate its insured for a loss covered by the policy." 9 Cal.3d at 574. For such liability to exist, the insurer must have acted "unreasonably." 9 Cal.3d at 573. See also, *Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 920 (1978).

Not every denial of a claim gives the claimant the right to recover extracontractual damages. Rather, only "when the insurer unreasonably and in bad faith withholds payment of the claim of its insured," is it "subject to liability in tort." *Gruenberg v. Aetna Insurance Company,* 9 Cal.3d 566, 575 (1973). The test of good faith or bad faith is one of reasonableness. *McCormick v. Sentinel Life Insurance Company,* 153 Cal.App.3d 1030, 1042 (1984). An insurer is subject to liability for "bad faith" only if it has denied a claim "without proper cause." *Brandt v. Superior Court,* 37 Cal.3d 813, 817 (1985). See also, *Pacific Southern Mortgage Trust Company v. Insurance Company of North America,* 166 Cal.App.3d 703, 715 (1985), and *Gourley v. State Farm Mutual Automobile Insurance Company,* 53 Cal.3d 121, 127-128 (1991).

A recent incisive analysis of the law of first party "bad faith" appears in an article entitled "Good Faith as a Matter of Law, the Insurance Company's Right to Be Wrong," by Douglas G. Houser, appearing in the Spring, 1992, issue of the *Tort and Insurance Law Journal,* a

publication of the Tort and Insurance Practice Section of the American Bar Association. Mr. Houser describes the rise of "bad faith" law as follows:

> "One of the biggest concerns insurance companies (and insurance company executives) face is the dramatic rise in potential liability for extracontractual damages for 'bad faith' in first-party claims. Many courts have recognized the misuse and abuse by claimants and overly aggressive plaintiffs' lawyers who frequently make unfounded 'boilerplate' allegations of 'bad faith' in virtually every first-party claim related to a coverage or claims handling dispute. Plaintiffs' advocates alleging 'bad faith' against insurers for the alleged mishandling of their insureds' claims result in jury verdicts and 'blood money' settlements that probably cost insurance companies and the insurance-buying public hundreds of millions of dollars each year.
>
> "The tort of first party bad-faith is usually said to have originated in California in 1968 and is sometimes referred to as the 'second California gold rush.'" (Footnotes omitted.) 27 Tort & Ins. L.J., at 665-666.

Although noting that the definition of "bad faith" varies from state to state, the author indicates that many jurisdictions have adopted a test, as he describes:

> "The two-part test for first-party bad faith is followed by many jurisdictions. Under this test, 'bad faith' claimants have the burden to

prove: (1) that the insurer's conduct was both unreasonable and (2) that the insurer intentionally denied a claim or delayed payment of a claim that the insurance company knew to be valid or showed a reckless disregard of the fact that a valid claim had been submitted.

"Courts uniformly reject a strict liability standard for bad faith claims, and most have held that negligence alone is insufficient to trigger liability of an insurer for the tort of bad faith. Therefore, to satisfy the 'fairly debatable' test, the plaintiff must 'go beyond a mere showing of nonpayment and prove a bad faith nonpayment, a nonpayment without any reasonable ground for dispute.' In other words, bad faith requires the showing of a 'frivolous or unfounded refusal to pay.'

"Under the reasonableness inquiry, courts must determine whether a reasonable insurer under the particular facts and circumstances would have denied or delayed payment of the claim. The absence of a legitimate, arguable, or fairly debatable reason for denial of coverage is one of the ultimate material facts upon which the insured claimant has the burden of proof. As long as the insurer has a reasonable basis for denying or delaying payment, the insurer should not be liable for bad faith. This is a simple matter of fairness. All persons, including insurance

> companies, should have the right to their day in court. The price of losing a trial should not be millions of dollars in punitive damages." (Footnotes omitted.) 27 Tort & Ins. L.J. at 667.

This test appears consistent with the definition of insurer tort liability found in the *Gruenberg* case, as cited above. The logical consequence of the two part test stated above is that, if reasonable minds can differ concerning the validity of a claim, there is no bad faith, as a matter of law. As Mr. Houser explains:

> "If an insurer can produce sufficient evidence to create a jury issue on the question of coverage, then there is clearly a 'fairly debatable' coverage question, and a court should dismiss any accompanying bad faith claim. A jury may ultimately determine that the insurance company was wrong on the issue of coverage, but the jury should not be permitted to consider imposition of extracontractual bad faith damages as a consequence of the company's challenge to the fairly debatable claim. '[W]here a claim is fairly debatable, the insurer is entitled to debate it and there is no bad faith on its part in doing so.'" (Footnotes omitted.) 27 Tort & Ins. Law Journal at 668.

After analyzing the theoretical problems with first party bad faith, Mr. Houser discusses what he describes as the "*Dutton* rule," established by the leading case of *National Savings Life Insurance Company v. Dutton,* 419 So.2d 1357 (Ala. 1982). Simply stated, the *Dutton* rule is

that "if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury." 27 Tort & Ins. L.J. at 669. In other words, as a matter of law, "[a] bad faith claim should not be successful unless reasonable minds could not disagree about the insured's right to collect under the policy, and the court is prepared to enter a directed verdict for the claimant on an insurance contract claim." 27 Tort & Ins. L.J. at 669. According to Mr. Houser, the *Dutton* rule has been followed or applied in 36 states, including California, and rejected in only three states. 27 Tort & Ins. L.J. at 669 and 674.

The author's ultimate conclusion with respect to the law of first party "bad faith" is as follows:

> "By recognizing an insurance company's right to challenge debatable claims, the great majority of the American courts help balance the scales of justice between a claimant's right to recover on a policy when a claim is intentionally and wrongfully denied and the insurance company's right to question arguable claims. Recognizing good faith as a matter of law is the long-term interest of premium-paying insureds and the financial predictability and stability of insurance companies. And the national trend is clearly to recognize this standard. Insurance companies have a good faith right to be wrong!" 27 Tort & Ins. L.J. at 673.

Certainly, if an insurer ever has the right to be wrong, such right existed in the present case. Mr. Burnaby

stated in writing, before the issuance of the defendant's insurance policy, that his house was a total loss, specifying a date of loss of September 19, 1983. Even if it is legally proper for him to disown this date of loss, it was certainly not unreasonable for the defendant to rely on it. Moreover, Mr. Burnaby gave statements under oath, in which he provided specific factual information that supported a conclusion that the proper date of loss of Mr. Burnaby's house long predated the inception of the defendant's insurance policy on December 20, 1983. Although, at trial, Mr. Burnaby retracted his prior sworn testimony, it certainly cannot be bad faith for Mr. Burnaby's insurer to have relied on it in denying his claim.

In *Austero v. National Casualty Company,* 84 Cal.App.3d 1 (1978),[8] the Court of Appeal reversed the extracontractual part of a judgment, in a first party "bad faith" case. It held that, although the defendant improperly denied a claim, its conduct was reasonable, as a matter of law. 84 Cal.App.3d at 35-36. In particular, the handling of the plaintiff's claim "was eminently reasonable and did take into account equally and fairly both the interests of the insured and the insurer." 84 Cal.App.3d at 35-36. Since "the ultimate test of liability in the first party cases is whether the refusal to pay policy benefits was *unreasonable* (emphasis in original)," the insurer could not be held liable for any extracontractual damages. 84 Cal.App.3d at 32.

In recognizing the right of an insurer to deny a claim where there was conflicting evidence with respect to the facts determining coverage, the *Austero* court noted that

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[8] *Austero* was disapproved on other grounds in *Egan v. Mutual of Omaha Insurance Company,* 24 Cal.3d 809 (1979).

an insurer must be given some latitude, and may consider its own interests, as well as the interests of the insured. The court made the following observation:

> "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business. Indeed, analysis of the leading first party cases demonstrates that a rule has never been applied which holds under any circumstances that an insurer which refuses to pay benefits claimed to be due under the policy did so at its own risk. Clearly, both logic and good policy dictate that no such rule ever be applied in first party cases." 84 Cal.App.3d at 30.

In deciding whether the handling of a particular claim was "unreasonable," the conduct of an insurer "must be measured as of the time it was confronted with a factual situation to which it was called upon to respond." 84 Cal.App.3d at 32. It is "essential that no hindsight test be applied." 84 Cal.App.3d at 32.

After the *Austero* court reviewed the substantial conflicting evidence with respect to the plaintiff's medical condition, it found that it was not even presented with a "close" case. 84 Cal.App.3d at 35. Rather, there was ample

evidence justifying the company's conduct, even if there was also conflicting evidence. In such a situation, the claims handling was reasonable as a matter of law. 84 Cal.App.3d at 35.

Another illustrative case is *Opsal v. United Services Automobile Association,* 2 Cal.App.4th 1197 (1991).[9] Like the present case, *Opsal* involved damage to a single family residence caused by earth movement. The insurer denied a claim under its homeowner's policy, and the homeowner sued for breach of contract, "bad faith," and fraud. 2 Cal.App.4th at 1201. The jury found in favor of plaintiff Opsal, awarding the policy limits of $52,000.00, $17,550.00 in attorney's fees, and 1.7 million dollars in punitive damages. 2 Cal.App.4th at 1201. The Court of Appeal upheld the contract damages, but took away all of the rest.

The *Opsal* court observed that "[i]t is now clear under California law that an insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages." 2 Cal.App.4th at 1205. There can be no bad faith liability, as

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[9] The *Opsal* case was originally decided on June 13, 1991, and reported at 231 Cal.App.3d 1530. On October 3, 1991, this court granted review, assigning case number S022097, thereby vacating the Court of Appeal opinion. Apparently, the court granted review in *Opsal because the case involved,* among other things, an issue that was also presented by *State Farm Fire & Casualty Company v. Von Der Leith,* 54 Cal.3d 1123 (1991), which was pending in the Supreme Court as of October 3, 1991, but not yet decided. The *Opsal* decision was reprinted without change at 2 Cal.App.4th 1197, in order to permit tracking pending review. Review was dismissed on March 19, 1992, and the cause remanded to the Court of Appeal. On July 9, 1992, this court ordered *Opsal* to be published.

a matter of law, if there is a genuine issue as to the insurer's liability. 2 Cal.App.4th at 1205-1206.

The Court of Appeal in *Opsal* found that the defendant's reliance on certain policy language in its denial of the plaintiff's claim was erroneous, but there was a genuine issue with respect to the validity of the insurer's position until the law was clarified. Hence, the trial court was directed to enter judgment in favor of the insurer as to all damages except those representing breach of contract. 2 Cal.App.4th at 1207.

If the Court of Appeal had reviewed any of the above authorities, it would have discovered the correct legal standard, and would have analyzed the record differently. As it was, the court appears to have derived much of its statement of facts from the respondent's brief, rather than from a careful review of the record. Among the factual errors of the Court of Appeal is the following:

> "Uncontroverted testimony was presented to the jury by an expert witness that the landslide manifested itself in the area of Burnaby's home in 1984 and that the cracks in the driveway were probably caused by tree roots." (Pages 10-11.)

This statement is untrue. The plaintiff's own geological expert, Dr. Awtar Singh, testified that he believed that the cracking in Mr. Burnaby's driveway was caused by earth movement. [2 R.T. A389.] Moreover, Dr. Singh also testified that earth movement may take place without anyone knowing it. [2 R.T. A386.] He stated that there were no survey monuments in the western area of the Big Rock Mesa until 1984, and that, as a result, there is no way to

know if earth movement took place prior to that year. [2 R.T. A388.]

In light of Dr. Singh's clear testimony, it is uncontrovertible that the passage from the court's opinion quoted above is mistaken. What the court has said is not supported by the record. Indeed, the record contradicts the court's statement of fact.

Unfortunately, the Court of Appeal simply did not understand what evidence is relevant to the question of whether the denial of a claim is reasonable. Section VII of the Court of Appeal opinion (pages 24-27) purports to summarize the "substantial evidence" justifying extracontractual damages. This portion of the opinion is not only factually inaccurate, but misses the point. The court discusses evidence that may tend to show that Mr. Burnaby's claim, as presented at trial, was valid. In contrast, the question of reasonableness of the denial of a claim must rest on the evidence on which the insurer relied in making the decision to deny the claim.

One ground for denial of the Burnaby claim was concealment of information on his insurance application. Admittedly, there was some conflict in the evidence concerning the various conversations that took place between Mr. Burnaby and his insurance agent. Nonetheless, it was quite reasonable for the insurer to rely on the information that it received, even though a jury, years later, believed contrary evidence. Even Mr. Burnaby admitted that he never told his agent about his written governmental claims, in which he stated that his house had been totally destroyed. Assuming that this omission on the part of Mr. Burnaby does not represent concealment as a matter of law, within the meaning of *Insurance Code* section 332, so as to

nullify Mr. Burnaby's insurance policy, it certainly represents enough evidence for the insurer to reasonable take the position that there was concealment.

The Court of Appeal also relies on the conclusion that it was "bad faith" for the defendant not to have consulted with a geologist employed by the County of Los Angeles, Mr. Dennis Evans. However, the uncontradicted evidence is that the defendant's coverage attorney, Mr. Jay Robinson, did not contact Mr. Evans because he believed that Mr. Evans "was someone else's expert witness," and that it would have been a "violation of the canons of ethics" for him to have contacted an expert witness hired by an adverse party in litigation. [11 R.T. 2358:7-11.] Even assuming it was negligent of Mr. Robinson to entertain this belief, it was certainly not bad faith for him and his client to have acted on it.

The Court of Appeal relies on certain tidbits of evidence from the defendant's claim file, indicating uncertainty about the date of loss for the Burnaby claim. There were also differences of opinion, reflected in the claim file, about the merits of the claim. This evidence, however, does not support a finding of bad faith. The test of bad faith is not incorrect resolution of conflicting evidence, but whether the ultimate decision of an insurer to deny a claim was reasonable.

The Court of Appeal refers to expert opinions concerning Mr. Evans, but fails to mention that the hypothetical facts on which those opinions were based, such as knowledge of the alleged availability of Mr. Evans to the defendant, were never established.

The Court of Appeal states that a claimsman "sent a notice to his superior, George Spilios, the claims depart-

ment manager, showing Burnaby's loss date as December 20, 1983, but sent a letter one week later to Burnaby's attorney indicating the company was of the opinion that the loss date was September 10, 1983, a date outside of the insurance policy period." (Opinion, page 27.) However, if the Court of Appeal had studied the record more carefully, it would have understood the significance of internal documents specifying the date of loss as December 20, 1983. An insurer may not properly establish a claim file, unless it can, at least tentatively, set a date of loss within the relevant policy period. Otherwise, coverage is not even theoretically possible. The date of December 20, 1983, was the earliest date on which the relevant insurance policy was in effect. Its use for internal purposes did not represent a company determination of its validity, and no such determination was ever communicated to Mr. Burnaby. [9 R.T. 1776-1777; 9 R.T. 1780-1790; 10 R.T. 2016-2017.] Rather, the only communication to Mr. Burnaby concerned the date of loss determination made by the defendant after careful investigation of the facts, including a review of Mr. Burnaby's governmental claims and the taking of sworn testimony from him.

The Court of Appeal confuses the question of the validity of Mr. Burnaby's contract claim with the separate and distinct issue of what is necessary to support a finding of extracontractual liability. A contract claim may be established by evidence showing its validity. An extracontractual claim can only be established if there is no substantial evidence supporting denial of a claim. The Court of Appeal did not discuss any of the evidence on which the denial of the Burnaby claim was based, because it was apparently unaware of the correct legal standard.

Had the Court of Appeal studied the record more carefully, paying particular attention to the evidence cited in the appellant's opening brief, it would have discovered that there was ample evidence on which to base a denial of the Burnaby claim. Much of that evidence emanated from Mr. Burnaby himself, although Mr. Burnaby had changed his testimony by the time of trial on various important points. In any event, the denial of the claim was reasonable, as a matter of law, and there should be no extracontractual liability, even if Mr. Burnaby is entitled to an award for breach of contract.

If Mr. Burnaby recovers contract damages, he will have been paid twice for his house, which is still habitable and in relatively good condition. He should not be paid twice, because, if the plaintiff has rights under his contract with the defendant, the defendant also has rights, including the right to subrogation.

IV.

In View of Contractual Provisions, Equitable Principles, and the Public Policy Against Double Recovery, the Subrogation Rights of a Property Insurer Are Not Lost by the Denial of a Claim, Even Where the Denial Is Later Determined to Have Been in Error.

The contract between the plaintiff and the defendant establishes the right of subrogation. Even if it did not do so, such a right would arise by operation of law. In particular, insurance companies are given the right of subrogation due to the nature of a contract of insurance as a contract of indemnity. *Offer v. Superior Court,* 194 Cal. 114, 118 (1924). "[T]he insurer on paying the amount of the loss on

the property insured is subrogated only in a corresponding amount to the insured's right of action against any other person responsible for the loss." 194 Cal. at 118. See also, *Stein v. Simpson,* 37 Cal.2d 79, 83-84 (1951), and *Royal Indemnity Company v. Security Truck Lines,* 212 Cal.App.2d 61, 65-66 (1963).

Where an insured has received benefits from his insurer, and has also received benefits from a tortfeasor, the insurer may not maintain a subrogation action against the tortfeasor. Nonetheless, in order to avoid double recovery, the insurer may be able to "recover from its insured." *Conservatorship of Edwards,* 198 Cal.App.3d 1176, 1184 (1988). See also, *Board of Administration v. Glover,* 34 Cal.3d 906 (1983).

California courts have long refused to allowed insured parties to have double recovery for a single loss. *Waite v. Godfrey,* 106 Cal.App.3d 760 (1980); *May v. Miller,* 228 Cal.App.3d 404 (1991). Where subrogation rights exist, the collateral source rule does not apply. Rather, the policy of the law against double recovery controls. *Ferraro v. Southern California Gas Company,* 102 Cal.App.3d 33 (1980).

In holding that the defendant's subrogation rights have been extinguished, the Court of Appeal relies on an obscure decision of the Supreme Court of South Carolina, *Powers v. Calvert Insurance Company,* 216 S.C. 309 (1950). This decision was based on a finding of waiver. Any finding of waiver in the present case would represent a legal fiction. In California, waiver is strictly defined, as the intentional relinquishment of a known right. *Insurance Company of the West v. Haralambos Beverage Company,* 195 Cal.App.3d 1308, 1321 (1987). Neither at the present

time, nor at any time in the past, has the defendant intended to waive any of its rights. If it is forced to pay money to Mr. Burnaby, it would most definitely want a credit in the amount that Mr. Burnaby has already received from the governmental entities that he successfully sued.

If the decision of the Court of Appeal becomes final, Mr. Burnaby will have been paid several times over for a house that still stands, even if it is still in some danger. He has received his share of a lucrative settlement with the County of Los Angeles and other governmental entities. His judgment against the defendant in the present case includes not only the value of his house, as specified in his insurance policy with the defendant, but extracontractual compensatory damages, plus punitive damages. The award of punitive damages is particularly outrageous, in light of the facts of this case and its procedural history.

V.

An Award of Punitive Damages Based Only on a Finding of "Fraud" Is Neither Authorized by Statute Nor Constitutional, Where No Such Claim Has Been Pleaded or Proved.

Although the jury exonerated the defendant as to the claims of malice and oppression, it made an inexplicable finding to the effect that the defendant was guilty of "fraud." Based solely on this finding, the jury awarded half a million dollars in punitive damages. The award was made, even though no claim of "fraud" was presented to the jury, and the subject came up only during giving of jury instructions for the punitive damages phase of the trial.

Civil Code section 3294(e) defines "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." This definition appears to be a codification of the common law definition of fraud, as found in cases such as *Lesperance v. North American Aviation, Inc.*, 217 Cal.App.2d 336 (1963), and *Okun v. Morton,* 203 Cal.App.3d 805, 828 (1988).

Of course, there is no such thing as a cause of action for punitive damages. Rather, a claim for punitive damages is merely incident to some other cause of action. *Orient Handel v. United States Fidelity & Guaranty Company,* 192 Cal.App.3d 684, 697 (1987). Although fraud alone is an adequate ground for awarding punitive damages, the plaintiff must prove every essential element of fraud, including justifiable reliance. 192 Cal.App.3d at 697.

Fraud must be pleaded with particularity. *Scafidi v. Western Loan & Building Company,* 72 Cal.App.2d 550, 553 (1946). This rule is the "last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings." *Committee on Children's Television, Inc. v. General Foods Corporation,* 35 Cal.3d 197, 216 (1983). The specificity requirement also serves the purpose of notifying the defendant of certain definite charges, so that the defendant will be able to meet them intelligently. 35 Cal.3d at 216.

The plaintiff here did not plead fraud with specificity. He did not plead it at all, as of the commencement of trial.

The leading recent case analyzing the right to recover punitive damages on a fraud theory is *Commonwealth Mortgage Assurance Company v. Superior Court,* 211 Cal.App.3d 508 (1989). In this case, the trial court granted summary adjudication of the issue of punitive damages, finding that the plaintiff had no right to recover such damages. 211 Cal.App.3d at 517. The Court of Appeal disagreed with the reasoning of the trial court, but upheld its ruling, finding the plaintiff's common law fraud theory inadequate. 211 Cal.App.3d at 517. The court noted that "[i]f no cause of action for fraud has been stated, there is nothing to which punitive damages can attach." 211 Cal.App.3d at 518.

The Court of Appeal in *Commonwealth Mortgage* analyzed the factual allegations made by the plaintiff, and found that necessary elements of a fraud cause of action, including justifiable reliance and damage, were lacking. 211 Cal.App.3d at 518-521. Thus, the court concluded, "[a]s the pleading fails to state a cause of action for fraud, there is nothing to which a claim for punitive damages can attach," and "the trial court properly granted summary adjudication of the issue that CMAC [the plaintiff] could not recover punitive damages." 211 Cal.App.3d at 521.

In *Opsal v. United Services Automobile Association,* 2 Cal.App.4th 1197 (1991), discussed earlier in this brief, the plaintiff sued for breach of contract, breach of the implied covenant of good faith and fair dealing, and "fraud." The supposed fraud consisted of failure to advise the plaintiff of facts that might establish coverage and supposedly improper assertion of a defense. 2 Cal.App.4th at 1201. The jury made an express finding that there was

fraud, and awarded $1.7 million in punitive damages. 2 Cal.App.4th at 1201.

On appeal, the judgment in favor of the plaintiff in *Opsal* was reversed with directions to render judgment in favor of the defendant insurer, except as to contract damages. The plaintiff alleged that the insurer "acted in bad faith and committed fraud in connection with the denial of [his] claim." 2 Cal.App.4th at 1205. The jury agreed with the plaintiff "on both counts, awarding compensatory bad faith damages" for attorney's fees, as well as "punitive damages." 2 Cal.App.4th at 1205. Both of these causes of action were found invalid, as a matter of law. The resolution of the "bad faith" issue is discussed in a prior section of this brief. The *Opsal* court also rejected the plaintiff's contention that "the jury's finding of fraud is itself sufficient" to support the judgment. 2 Cal.App.4th at 1206. In particular, the Court of Appeal rejected the argument that there was a sufficient "fraud" claim based on statements made in the denial of the plaintiff's claim and also rejected the related contention that the insurer wrongfully concealed a legal theory on which the plaintiff might have relied. 2 Cal.App.4th at 1206-1207. Although *Opsal* does not specifically hold that there must be an independent cause of action for fraud before there can be any punitive damages based on a finding of fraud, such a holding is implicit in the court's decision.

Unfortunately, as in other portions of its opinion, the Court of Appeal makes a number of serious factual and legal misstatements in analyzing the issue of punitive damages. In reference to the issue, it is asserted that "Standard does not point this court to a timely and specific objection made to any evidence presented, any jury instructions given or any argument made to the jury on this issue."

(Opinion, page 28.) This statement is plainly wrong. As noted in this petition, and in the appellant's opening brief, a specific objection was made to the proposed standard punitive damages instruction on the ground that there was no cause of action for "fraud." [16 R.T. 3413.] In any event, in light of the provisions of *Code of Civil Procedure* section 647, no objection to the instruction was even required. As to evidence and argument, there was none, since there was no issue of fraud in the case.

The Court of Appeal asserts that "there is ample evidence, which is reviewed hereinafter, to justify the jury award of exemplary damages." (Opinion, page 30.) No such evidence is ever mentioned subsequently in the opinion. Presumably, the belated claim of "fraud" concerns the letter in which Mr. Burnaby's claim was denied, which asserted facts with which Mr. Burnaby disagreed. If *Civil Code* section 3294(e) is interpreted to embrace such a letter, as the Court of Appeal apparently has done, the consequences are staggering. The requirement of [proving] detrimental reliance on the part of plaintiffs claiming fraud would be eliminated.

The decision to deny the Burnaby claim was made prior to the time that the decision was communicated to Mr. Burnaby's attorneys. Mr. Burnaby in no sense relied on that communication, and the denial letter did not, by itself, cause any harm. It merely documented the defendant's position.

If the Court of Appeal is right in its novel interpretation of *Civil Code* section 3294(e), then punitive damages may be sought in any case, on any cause of action, where the defendant denies liability. In such a situation, if the plaintiff prevails, the denial can be characterized as false,

and the denial is the instrument of resistance to the plaintiff's claim. Such an expansive interpretation of the statute must be rejected.

The reliance of the Court of Appeal on *Arzaga v. Villalba,* 85 Cal. 191 (1890), and *Haigler v. Donnelly,* 18 Cal.2d 674 (1941), is misplaced. In *Arzaga,* the plaintiff's cause of action was based on conversion achieved by means of fraud, and such a cause of action is obviously a fraud cause of action as well as a conversion cause of action. All of the elements of a cause of action for fraud were present in *Arzaga,* thereby permitting punitive damages on the basis of fraud. In *Haigler,* the award of punitive damages was upheld on the basis of a finding of malice, not on a finding of fraud without a cause of action for fraud.

If the Court of Appeal has correctly interpreted *Civil Code* section 3294(e), the statute is unconstitutional, as applied to the facts of the present case. As of the time of trial, the operative second amended complaint contained no fraud cause of action, nor even an allegation of any supposed false statement of fact or concealment, by which the plaintiff was deprived of property. Without such notice of charges, the defendant has been deprived of its property without due process of law. "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. People of the State of California,* 355 U.S. 225, 228 (1957). The award of punitive damages is, of course, quasicriminal in character. In any event, the requirement of notice applies in civil as well as criminal cases. *Payne v. Superior Court,* 17 Cal.3d 908 (1976); *TXO Production Corporation v. Alliance Resources Corporation,* -- U.S. --, 93 Daily Journal D.A.R. 8072 (June 28, 1993).

The award of punitive damages, in the amount of half a million dollars, is an outrage. The defendant merely denied a claim under an insurance contract, after careful investigation, relying mainly on information from the claimant himself. Although the claimant changed his story, and was able to persuade a jury of the truthfulness of his new version of the facts, it cannot properly be said that the conduct of the defendant was fraudulent, so as to justify punishment of the defendant. The award of punitive damages is based on an erroneous and unconstitutional interpretation of *Civil Code* section 3294(e). It violates both the Constitution of the United States of America and the Constitution of the State of California.

VI.

Conclusion.

Based on the foregoing argument and authorities, it is respectfully submitted that this court should grant review and thereafter reverse the judgment of the Court of Appeal.

Since the plaintiff was uninsured at the time that he stated, in writing, that his house was a total loss due to landslide damage, he is not entitled to coverage under a subsequently purchased homeowner's policy. He is certainly not entitled to massive extracontractual compensatory damages or to punitive damages based on a finding of "fraud," where no such claim was pleaded or proved. This court has the duty to correct a million dollar injustice, and clarify the applicable law.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL,
Roy G. Weatherup,
Michael J. Leahy, and
Rita Gunasekaran

Attorneys for Defendant and Appellant,
THE STANDARD FIRE INSURANCE COMPANY

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on July 9, 1993, I served the within *Petition For Review* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, California Supreme Court
Ronald Reagan Building
300 South Spring Street
2nd Floor
Los Angeles, California 90013
(Hand-Delivered: Original and 14 Copies)

Clerk, California Court of Appeal
Second Appellate District
Division One
2nd Floor, North Tower
300 South Spring Street
Los Angeles, California 90012

Mr. A. Tod Hindin
8383 Wilshire Boulevard, Suite 400
Beverly Hills, California 90211

Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

Mr. Michael M. Berger
BERGER & NORTON
1620 26th Street, Suite 200 South
Santa Monica, California 90404

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 9, 1992, at Los Angeles, California.

Betty J. Malloy
(Original Signed)

§ 3294. (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

APPENDIX I

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to ***Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure*** based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section ***377.62*** of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX J

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on November 24, 1993, I served the within *Appendix To Petition for Writ of Certiorari, Volume II of II (Appendix H to J)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
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Washington, D.C. 20543
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Berger & Norton
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Los Angeles, California 90013

Mr. Tod A. Hindin
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Los Angeles, California 90024
(Attorney for Respondent Frank Burnaby)

Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 1993, at Los Angeles, California.

Betty J. Malloy
(Original Signed)

(4)

Supreme Court, U.S.
FILED
DEC 23 1993
OFFICE OF THE CLERK

No. 93-848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STANDARD FIRE INSURANCE COMPANY,
Petitioner,
vs.
FRANK BURNABY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-848

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STANDARD FIRE INSURANCE COMPANY,
Petitioner,
vs.
FRANK BURNABY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Certiorari is based on fiction.

Seeking to build on the due process requirement of notice emphasized by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, __U.S. __, 113 S.Ct. 2711 (1993), the Petition presents as its "Question" the constitutionality of a punitive damage award based on a finding of fraud where fraud has not "even been alleged." (Pet. i)

The premise of the Petition is demonstrably false. The following allegation appears *three times*, in *three different causes of action*, in the Second Amended Complaint (which was filed as Appendix E to the Petition for Certiorari):

> "Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him. Those actions are oppressive, *fraudulent*, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages." (App. E-11, ¶ 38 [cause of action for breach of the duty of good faith and fair dealing]; App. E-13, ¶ 45 [cause of action for breach of fiduciary duty]; and App. E-15, ¶ 51 [cause of action for breach of statutory duty].)

Petitioner is plainly unhappy with the judgment rendered against it and the agreement of the jury and 3 levels of state courts that the judgment was appropriate based on the Petitioner's conduct. That, however, is no basis for invoking this Court's jurisdiction.

No constitutional issue is embedded in this record. The modest award was fully justified by the record and — contrary to the false premise invented of whole cloth for the purpose of attracting this Court's attention — the Petitioner's fraudulent conduct was repeatedly alleged in the complaint.

Respondent Frank Burnaby prays that the Petition be denied.

Respectfully submitted,

MICHAEL M. BERGER
Counsel of Record

BERGER & NORTON

Attorneys for Respondent
FRANK BURNABY

JAN 12 1994

No. 93-848

In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-848

In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, the Standard Fire Insurance Company, pursuant to rule 15.6 of the *Rules of the Supreme Court of the United States,* submits this brief in response to the opposition brief filed by respondent Frank Burnaby on or about December 23, 1993. It is respecfully urged that certiorari should be granted to resolve the important consti-

tutional issue presented by the petitioner. Mr. Burnaby has not demonstrated, in his opposition brief, any infirmity in the contentions of the petitioner.

I.

The Respondent Has Virtually Conceded the Petitioner's Contentions Concerning the Applicable Law, as Well as Conceding the Petitioner's View of the Facts, Leaving Only the Question of the Adequacy of the Purported Notice of the Claim of "Fraud."

Plaintiff Frank Burnaby, the respondent in this court, has filed a terse, two page opposition brief, in accordance with rule 15.1 of the *Rules of the Supreme Court of the United States*. Among other things, rule 15.1 provides that "the brief in opposition should address any perceived misstatements of fact or law set forth in the petition." The rule also admonishes attorneys for respondents that "they have an obligation to the Court to point out any perceived misstatements in the *brief in opposition*, and not later." (Emphasis in original.)

As to the applicable law, the plaintiff does not dispute anything stated by the defendant and petitioner. He appears to concede that notice is an essential component of due process of law; that the required notice must be adequate to give the defendant in a civil proceeding sufficient information to be able to defend himself; that the notice must include fair warning concerning the requirements of the law; that notice of factual charges concerning the particular claimed wrongful conduct of the defendant in

a civil matter must be set forth in the plaintiff's pleading; and that the notice must be given before the end of trial. Since the plaintiff does not dispute these basic principles, and indeed does not analyze the law at all, it must be deemed that these principles are conceded by the plaintiff.

As to any possible misstatement of fact, there is very little in the short opposition brief. Although it is asserted that the petition for a writ of certiorari is "based on fiction," the plaintiff does not explain how this is so. He does not take issue with any factual matter asserted in the petition. Rather, he simply quotes three sentences, which are repeated in three places in his second amended complaint. The same sentences are, of course, already quoted in the defendant's petition for a writ of certiorari (at page 8).

The plaintiff does not really dispute the defendant's view of the facts. Rather, he disputes the legal effect of the three quoted sentences, of which only a single word, "fraudulent," is even relevant.

The issue before this Court is, therefore, whether the insertion of the word "fraudulent," in a boilerplate characterization of the defendant's conduct, is constitutionally sufficient to put the defendant on notice of a massive claim for punitive damages based on "fraud." The plaintiff contends that it is sufficient, even though no "fraud" cause of action was asserted, and even though no facts constituting fraudulent conduct, however defined, are alleged in the operative pleading of the plaintiff.

II.

The Operative Complaint of the Plaintiff Did Not Give Constitutionally Sufficient Notice of His Claim for Punitive Damages Based on "Fraud."

Since the filing of defendant's petition for a writ of certiorari, this Court has reaffirmed the principle that notice is an essential part of the concept of due process of law. In *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492 (1993), this Court ruled that the government, in a civil forfeiture case, may not seize real property "without first affording the owner notice and an opportunity to be heard." ___ U.S. at ____, 114 S.Ct at 497. Citing the seminal case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), and other authorities, the majority observed that "[o]ur precedents establish the general rule that individuals must receive notice and an opportunity to be heard" before they are deprived of property. ____ U.S. at ____, 114 S.Ct. at 498. In fact, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." ____ U.S. at ____, 114 S.Ct. at 500. According to the plaintiff here, in his opposition brief, the fundamental constitutional right to notice may be satisfied by the mere insertion of the epithet "fraudulent" in a string of epithets characterizing the defendant's conduct, without reference to any specific facts involving any type of "fraud." Such a position is untenable.

A defendant who is merely told that his conduct is "fraudulent" has no way of knowing the charges against which he must defend himself, where there is no fraud

cause of action. In the present case, the adjective "fraudulent" was attached to causes of action for breach of the covenant of good faith and fair dealing, violation of the statutory duty to settle claims, and breach of fiduciary duty. None of these causes of action included any allegation with respect to any material misrepresentation of fact, any intent to defraud, or any detrimental reliance. There never was any claim by the plaintiff that the defendant said anything with the intention of depriving the plaintiff of his property or his legal rights. Certainly a party charged with "fraud" has the constitutional right to know the factual basis of the claim. Moreover, a defendant should be given notice that a state's punitive damages statute may be interpreted to allow recovery of such damages based on a finding of "fraud," without the plaintiff being required to plead or prove a cause of action for "fraud," where the statute has never been so interpreted in the long history of the statute, stretching back more than a century.

It is respectfully submitted that the mere insertion of the word "fraudulent," in a rather prolix pleading, is insufficient to satisfy the constitutional requirement of notice. As this Court held in *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950), the requirement of notice is not simply notice of the pendency of a legal proceeding. Rather, the notice must be sufficiently specific that the party receiving it is able to act in the protection of that party's interests. In *Mullane*, for example, the notice given of a probate hearing was deemed constitutionally defective, because it did not refer to the right of the beneficiaries to have a trustee answer for negligence, and it did not advise the beneficiaries that their recoveries might

be diminished by attorney's fees that could be challenged. 339 U.S. at 313.

In the present case, there was a very long trial. No question of "fraud" came up at any time, until the trial was almost over. The defendant had never been called upon to defend itself against any claim of "fraud." No such cause of action was ever submitted to the jury. The defendant's constitutional right to notice was thus violated, when punitive damages were awarded based on a finding of "fraud."

In his opposition brief, the plaintiff asserts that the defendant "is plainly unhappy with the judgment rendered against it." (Page 2.) This statement is true. No defendant is ever pleased with a massive award of punitive damages based on violation of constitutional rights.

The plaintiff also asserts that the judgment in his favor was found "appropriate" by three levels of state courts. (Opposition brief, page 2.) This statement is not quite correct. The Supreme Court of California was apparently alarmed and embarrassed by the interpretation placed by lower courts on the state's punitive damages statute, and it thus "depublished" the opinion of the Court of Appeal, thereby suppressing it.

In his opposition brief, the plaintiff has simply ignored the contentions of the defendant with respect to the crisis created by escalating punitive damages awards. Nonetheless, this Court should not ignore the crisis, particularly where it is caused by violation of the constitutional rights of defendants.

III.

Conclusion.

This Court should grant the defendant's petition for a writ of certiorari, so that it may consider the narrow, but important, constitutional issue presented by this case. In his opposition brief, the plaintiff has virtually conceded everything that the defendant argues, except for the issue of the legal effect of his inclusion of the epithet "fraudulent" in his pleading. The defendant earnestly contends that the use of this word, by itself, is insufficient to constitute notice of a claim for massive punitive damages, under the circumstances of this case.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL, and
Roy G. Weatherup

Attorneys for Petitioner
STANDARD FIRE INSURANCE COMPANY

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on January 10, 1994, I served the within *Reply to Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
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Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 10, 1994, at Los Angeles, California.

Betty J. Malloy
(Original Signed)